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FROM
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A TREATISE

ON THE

MEASURE OF DAMAGES;

OR

AN INQUIRY INTO THE PRINCIPLES WHICH GOVERN THE AMOUNT OF PECUNIARY COMPENSATION AWARDED BY COURTS OF JUSTICE.

BY

THEODORE SEDGWICK,

AUTHOR OF "A TREATISE ON STATUTORY AND CONSTITUTIONAL LAW."

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A TREATISE

ON THE

MEASURE OF DAMAGES.

CHAPTER XXX.

MEASURE OF DAMAGES IN ACTIONS FOR POSSESSION OF REAL PROPERTY.

§ 898. The general principles modified in actions concerning real estate.
899. Actions for possession of real estate.
900. Damages in real actions in the early law.
901. Ejectment.
902. Nominal damages in ejectment suit.
903. Ejectment—Payment for improvements.
904. Improvements under Louisiana Code.
905. Mesne profits and damages.
906. Mesne profits always recoverable.
907. Damages given by the early law.
908. General rule in actions to recover mesne profits.
909. Recovery measured by the net profits.
§ 910. Waste or injury to the freehold.
911. Period during which compensation may be recovered.
912. Time from which compensation may be recovered.
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914. Statute of limitations.
915. Allowance for improvements.
916. Good faith required.
917. For what improvements allowance is made.
918. Payment of necessary expenses by the defendant.
919. Interest on mesne profits.
920. Costs and counsel fees.
921. Dower.
922. Dower in improvements.

§ 898. **The general principles modified in actions concerning real estate.**—We have now discussed the principles laid down by the courts with regard to the measure of damages in all ordinary cases of contract and tort (not turning upon the interpretation of statutes), except those relating to land. These we have reserved for consideration here, inasmuch as the rules applicable to them are frequently of a more arbitrary character than those which lie at the foundation of personal actions. This is in a

great measure owing to the fact that the courts have here been hampered in applying the general rules of compensation, partly by the peculiar character of the old common-law forms of action, and partly by considerations of public policy or the intent of parties, derived from a condition of society which has passed away. In some jurisdictions these difficulties have been met by a more or less complete assimilation of the law of real to that of personal property. In others they have led to peculiar rules, which cannot be well understood except by considering the special circumstances which have led to their adoption in the light of the general principles the examination of which has now been completed.

§ 899. **Actions for possession of real estate.**—* Five of the first chapters of Mr. Sayer's work on Damages are devoted to a consideration of the law of damages in the actions of *Assize of novel disseizin*, *Entry sur novel disseizin*, *Assize of mort d'ancestor*, *Cosinage*, *Aiel and Besaiel*. Many of the forms of real actions were introduced into America from the mother country,[1] and some still survive; but the particular actions above mentioned have been rarely if ever employed in the Union; and they were in England absolutely abolished by the statutes 3 and 4 Will. IV, ch. 27, § 36, for the "limitations of actions," which swept away, indiscriminately, between fifty and sixty species of proceedings, leaving as the only real or mixed actions, *a writ of dower*, *dower unde nihil habet*, *quare impedit*, *and ejectment*.[2] Repeated statutory changes have also been made in the various States on this same subject, the general result of which has been that the actions of ejectment or trespass to try titles and

[1] As to the extent to which the real actions were adopted by us, see 4 Kent's Commentaries, 70, *in notis*; an article by Judge Jackson in the American Jurist, vol. ii. p. 65; and Stearns on Real Actions, 396, n.

[2] Warren's Law Studies, 1st ed., 15, 16, *in notis*.

dower are the only real or mixed actions now in extensive use in the Union.(a) The action of *quare impedit*, relating to a species of property—advowson—which never existed among us, is wholly a stranger to American jurisprudence. There is still another form of action—waste—by which the possession of real estate is sometimes changed, and which may, perhaps, strictly belong to this division of the subject; but it is more conveniently and appropriately discussed under the head of trespasses, nuisances, and other interferences with the occupation or enjoyment of real property.

The actions above named are the usual modes of procedure with us, by which the possession of real estate is now altered. It is necessary briefly to allude to the general principles regulating damages in real actions as they once existed; but the sweeping changes which have been effected in the original structure of English jurisprudence will make this discussion a very cursory one; and we shall then examine the law in regard to the substitutes which have now taken their places—ejectment and dower.

§ 900. **Damages in real actions in the early law.**—In real actions, properly speaking, damages were not originally given at common law,[1] "for it is of the essence of a real action, that only a real thing can be recovered therein; whenever damages, which are a pecuniary recompense, and consequently a personal thing, are recoverable in the same action, the action becomes mixed."[2] By the statutes of

[1] Sayer, Damages, 5; Stearns, Real Actions, 390.

[2] In the Assize of Novel Disseisin damages were recovered if the tenant was the original disseisor, but not otherwise: 3 Twiss' Bracton, 35, 43, 97, 99, 109, 197–205, 341; Symons *v.* Symons, Hetley 66. So in Pilfold's

(a) In New England the Writ of Entry is the form of action for the recovery of land, being in many respects analogous to the action of Ejectment, or the statutory action which in most States has taken its place.

Merton, Marlbridge, and Gloucester, however,[1] damages were given in the principal real actions. In those actions where no damages were directly given, and in which, pending the suit, the defendant might impair the value of the property, the ancient writ of *estrepement*[2] gave indirect relief. It lay properly in real actions where the plaintiff could not recover damages by his suit, and, as it were, supplied damages.[3]

In regard to property in advowsons it may be briefly noticed that no damages were recoverable at the common law in an assize of *darrein presentment*, nor an action of *quare impedit*.[4] And the action of *darrein presentment* was abolished in England by the statute of limitation of actions, to which we have already referred. By the statute of 2 West., c. 5, it was provided, in writs of *quare impedit* and *darrein presentment*, if a disturbance of six months took place, that damage should be awarded to two years' value of the church; if six months did not pass, but the presentment were *deraigned* (*i. e.*, proved) within that time, damages should be awarded to half a year's value of the church. If a more particular view of this branch of our subject is desired by the student, he will find it in those English treatises which are devoted to this

Case, 10 Co. 115, it is said, "At the common law, before the statute of Gloucester (anno 6 E. I. c. i), a man should not recover damages in any real action, as in dower, before the statute of Merton, c. i, nor in Aiel, Mordancestor, before the said statute of Gloucester; but in actions mixed, as in assize, entry in the nature of assize, or in personal action, as trespass *quare clausum fregit*, of goods taken away, etc. . . . . In personal actions they shall declare to damages, because they shall recover damages only for the wrong done before the writ brought, and shall recover no damages for any done pending the writ; but in real actions the demandant shall never count to damages, because he is to recover damages pending the writ." See also, 1 Roscoe on Real Actions, 307.

[1] 20 Hen. III, c. 3; 52 Henry III, c. 16; 6 Edw. I, anno 1278.

[2] Estrepamentum—from the Fr. *estropier—mutilare*.

[3] Termes de la Ley, *in voc.*; Tomlin's Law Dictionary, *in voc.* In New York, by Co. Civ. Proc. § 1681, the benefit of this writ is given by a provision which, where an action is brought for the recovery of land, or the possession thereof, authorizes the court in which the suit is pending, to make an order restraining the defendant from the commission of waste.

[4] Sayer, 35.

particular matter. The scope of this work does not allow a further examination of it. We come, then, to consider the law of damages in the actions relating to real property, as in general application in the Union.

§ 901. **Ejectment.**—While the action of ejectment remained in its original state and the ancient practice prevailed, the measure of damages given by the jury when the plaintiff recovered his term were the profits of the land accruing during the tortious holding of the defendant. But as upon the introduction of the modern system the proceedings became altogether fictitious, and the plaintiff merely nominal, the damages assessed became nominal also; and they have not, since that time, included the injury sustained by the claimant from the loss of his possession,[a] ** the action of trespass for mesne profits being used to cover that loss.

This is still true in some of our States; while in many of them *the course of proceedings is to recover the mesne profits in the action of ejectment, or in an action of trespass to try the title.[b] In the latter States the rules that we shall proceed to give, in regard to the action of trespass for mesne profits, will, it is to be supposed, govern in the ejectment suit, or in the action of trespass to try title.

The only case in which actual damages could be recovered in the ejectment suit itself was that where the plain-

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[a] Adams on Ejectment, 333. "Before the time of Henry VII," said Wilmot, C. J., in Goodtitle *v.* Tombs, 3 Wils. 118, "plaintiffs in ejectment did not recover the term, but until about that time the mesne profits were the measure of damages." Reeves Hist. Eng. Law (ed. 1880), p. 241; Stearns, Real Actions, 401; Davis *v.* Delpit, 25 Miss. 445; Emrich *v.* Ireland, 55 Miss. 390.

[b] Stearns, Real Actions, 403, note.

tiff's title expired pending the action.[1] So in New York,[2] where the plaintiff's life estate had terminated before trial, the Supreme Court said: "The plaintiff has no title to turn the defendant out of possession, but he has a title to the mesne profits and the costs of this suit, and must, therefore, have judgment to enable him to recover them." ** But it is held in North Carolina that, though in ejectment the usual and proper course is to give the plaintiff nominal damages, leaving the real damages to be recovered in the subsequent correlative action of trespass for mesne profits; yet it would not be error to direct that the actual damages should be assessed in the ejectment suit, the division of actions being merely for convenience.(a)

§ 902. **Nominal damages in ejectment suit.**—But since the ejectment suit was in many jurisdictions not necessarily merged with the action for mesne profits, * it has been decided in New York[3] that a recovery of nominal damages in the action of ejectment is no bar to an action for the mesne profits, and that it is not necessary to enter a *remittitur*. In Pennsylvania, however, it has been decided that the damages in ejectment being merely nominal, a verdict finding for the plaintiff without assessing damages is not thereby vitiated.[4] **

[1] Runnington on Ejectment, 404; England *v.* Slade, 4 T. R. 682, 683; Co. Litt. 285*a*; Doe *v.* Bluck, 3 Camp. 447; Thrustout *v.* Grey, 2 Strange 1056; Adams on Ejectment, 228.

[2] Jackson *ex dem.* Henderson *v.* Davenport, 18 Johns. 295, 302. Wilkes *v.* Lion, 2 Cow. 333; Robinson *v.* Campbell, 3 Wheat. 212. This seems to have been the rule in Pennsylvania; when the term of the plaintiff expired before the trial, although he could not recover the possession, yet he might proceed for damages for the trespass and for mesne profits. Brown *v.* Galloway, 1 Pet. C. C. 291, 299. So in South Carolina, in an action of trespass to try titles: Stockdale *v.* Young, 3 Strobh. 501. In New York the case is now covered by the statutory provision which enacts (Co. Civ. Proc, § 1520): "If the right or title of a plaintiff (in ejectment) expires after the commencement of the action, but before the trial, the verdict must be returned according to the fact, and the plaintiff is entitled to judgment for his damages for the withholding of the property, to the time when his right or title so expired."

[3] Van Alen *v.* Rogers, 1 Johns. Cas. 281.

[4] Harvey *v.* Snow, 1 Yeates 156.

(a) Miller *v.* Melchor, 13 Ired. 439.

§ 903. **Ejectment—Payment for improvements.**—* In regard to improvements made on the land while out of the possession of the rightful owner, the general principle of the English law, as well as of our own, is that the owner recovers his land in ejectment without being subjected to the condition of paying for improvements which may have been made upon it by any intruder, or occupant without title. The improvements are considered as annexed to the freehold, and pass with the recovery. Every possessor makes such improvements at his peril, and whether acting on an honest belief in his title or without color of right, the party who is ousted loses all benefit of his expenditures.([a])** This rule, however, refers only to a simple action of ejectment to recover possession. Where damages are sought, they are often subject to deduction for improvements, as we shall find in considering the determination of mesne profits.([b])

The civil law, however, as we shall see, draws a clear line of distinction between the possessor *bonæ fidei* and *malæ fidei;* and the latter only loses the benefit of his improvements.([c]) This, too, is the case in California ([d]) and Louisiana.([e])

([a]) 2 Kent's Com. 335. The same rule holds in an action of trespass by a tenant against his landlord to recover damages for being ejected before the end of his lease. Schlemmer *v.* North, 32 Mo. 206.

([b]) See *infra*, § 915. One who forcibly disseizes another and improves his land can have no claim for the value of his improvements, because he has no right to improve another's property against the owner's will. But a *bona fide* occupant is entitled to have them taken into account in ascertaining whether the owner of the land has sustained damage or not, both in the case where such improvements were made by the occupant and by one whose title he has purchased. Morrison *v.* Robinson, 31 Pa. 456.

([c]) Institutes, § 30, *De Ædificatione ex Suâ Materia in Solo Alieno*, and § 35, *De fructibus bonâ fide perceptis.*

([d]) Carpenter *v.* Small, 35 Cal. 346.

([e]) The Civil Code of Louisiana, Art. 508, provides: "If the works have been made by a third person, evicted but not sentenced to make restitution

§ 904. **Improvements under the Louisiana Code.**—In New Orleans *v.* Gaines,[a] an appeal from a decision under this provision of the Louisiana Code, it was held that, although the defendant could require the plaintiff to elect whether she would have the building demolished or pay the value, the section did not apply where the defendant had not required the plaintiff to make an election. A bill was filed by Mrs. Gaines to compel an account of the rents and profits of land recovered under a former decision of the court in the same litigation, by which the city was held a possessor in bad faith,[b] and liable for rents and profits during its occupation, and to obtain a decree for the amount so ascertained. No rent as such had been derived from the land, but the city had established a draining machine on it, by the use of which a large district belonging to the city, had (as well as the land in question) been drained, and had in consequence become valuable and productive of revenue by taxation. At the beginning of the wrongful occupation, which was in September, 1834, the land was worth $2,000. The city had erected on it buildings, which (independent of the drainage machinery) cost $18,000, and the fair rental value of the land and buildings was $2,400 a year. The

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of the fruits (mesne profits), because such person possessed *bona fide*, the owner shall not have a right to demand the demolition of the works, but he shall have his choice either to reimburse the value of the materials and the price of workmanship, or to reimburse a sum equal to the enhanced value of the soil." See Stanbrough *v.* Barnes, 2 La. Ann. 376. This provision of the Louisiana Code (Art. 500, Rev. Code, 1870, 508) is copied from the digest of the civil law of the Territory of Orleans (Dig. Law of Territory of Orleans, 1808, book 2, tit. 2, ch. 3, sec. 1, art. 12), which was itself taken, with very slight verbal alteration, from the Code Napoleon (Code Civile, § 555), and substantially declares the rule of the civil law (Domat, part 1, book 3, tit. 5, sec. 3; Toullier, liv. 3, tit. 1, §§ 307, 308; and see Pothier, Droit de Propriété, art 1, ch. 2. sec. 3, art. 3).

(a) 15 Wall. 624.

(b) 6 Wall. 642.

expense of repairs was $500 a year, The master to whom it was referred to take an account of the rents and profits, made several estimates on different bases. By one of these he charged the defendant with the market value of the premises during the period of wrongful occupation and interest, and allowed the expense of repairs and interest. The report was excepted to, chiefly on the following grounds: That the defendant's liability should have been limited to the loss of the improvements, and that it should have been protected in the possession of these improvements until the complainant had paid their value or required their removal, and that she should have been compelled to elect which; that the defendant should have been allowed the benefit of the prescription of three years against the claim for rents;(a) that the defendant had received no rent, income, or remuneration, but had expended a large sum for the buildings and draining machine; that it was not liable for any rents, because it had dedicated the property to the use of the public; that other lands of the complainant had been greatly benefited by the drainage effected by the machine; and that the defendant was erroneously treated as a mere trespasser. But the Circuit Court disallowed the exceptions, confirmed the master's report on the above basis, made a decree for the difference between the two sums, amounting to $125,266.79, and this decree was affirmed by the Supreme Court of the United States.(b)

§ 905. **Mesne profits and damages.**—* As nominal damages only were given in ejectment, it was necessary to provide another remedy for the claimant for the injury sustained by him from the loss of his possession; and this

(a) La. Code, § 3538.

(b) See also Gaines *v.* New Orleans, 4 Woods 213; Gibson *v.* Hutchins, 12 La. Ann. 545; Cannon *v.* White, 16 La. Ann. 85.

was effected by a new application of the common action of trespass *vi et armis*, generally termed an action for mesne profits, in which action the plaintiff complained of his ouster and loss of possession, stated the time during which the defendant (the beneficial occupant) had held the lands, and taken the rents and profits, and prayed judgment for the damages which he, as rightful owner, had thereby sustained.[1] **

In most of the States, by statute these two actions have been blended, and the plaintiff in an action to recover the land is allowed also to recover the mesne profits. The subject of mesne profits, therefore, though it would otherwise properly be considered in connection with actions for injury to real property, will be introduced here, in connection with the action of ejectment. * And the remarks which we shall make, and the authorities cited, will apply to the action for trespass to try titles in those States where by statute this remedy has been made to assume the functions of the former actions of ejectment and trespass for mesne profits, and also to the action of ejectment in those States where the plaintiff is allowed to recover the rents and profits in that proceeding.** But the ejectment and the mesne profits, though they may be combined in one suit, continue to be distinct causes of action; and no recovery can be had on account of mesne profits, unless it is supported by a proper allegation in the complaint or declaration.([a])

Whatever the principle of classification adopted by the various courts, it is clear that the rents and profits lost

[1] Adams, Ejectment, by Tillinghast, ch. xiv, 379, 380.

([a]) McKinlay *v.* Tuttle, 42 Cal. 570; Arnold *v.* Woodward, 14 Col. 164; Larned *v.* Hudson, 57 N. Y. 151; Livingston *v.* Tanner, 12 Barb. 481. In Strong *v.* Garfield, 10 Vt. 502, it was held that the plaintiff *must* recover mesne profits in the ejectment suit; and a separate suit would not lie.

are to be distinguished from the damages suffered by way of actual injury to the premises and consequential or secondary loss. Such damages, as will be seen, are recoverable in the same action in which the profits are claimed, but the mesne profits constitute the subject-matter of a distinct and entire claim, and compensation for their loss is regulated by a specific set of rules.

§ 906. Mesne profits always recoverable.—* The mesne or intermediate profits of lands are those received while the property is withheld from its rightful occupant; and when he recovers possession, the right to the mesne profits follows his recovery.[1] By the Roman law, the *bona fide* possessor of land held without title was not liable to the legitimate owner for the *fructus*, or mesne profits. *Si quis a non domino quem dominum esse crediderit, bonâ fide fundum emerit, vel ex donatione, aliâve quâlibet justâ causâ, æque bonâ fide acceperit, naturali rationi placuit fructus quos percepit ejus esse pro culturâ et curâ. Et ideo, si postea dominus supervenerit et fundum vindicet, de fructibus ab eo consumtis agere non potest.*[2] This is also the rule of the Scotch[3] and of the French system;[4] and the same principle prevails in

[1] "Though a disseizee may have his action of trespass *quare clausum fregit* against the disseizor for the injury done by the disseizin, at which time the plaintiff was seized of the land, he cannot have it for any act done after the disseizin until he hath gained possession by re-entry, and then he may maintain it for the intermediate damage done; for, after his re-entry, the law, by a kind of *jus postliminii*, supposes the freehold to have all along continued in him." 3 Black. Com. 210; 4 Kent's Com. 119; Stevens *v.* Hollister, 18 Vt. 294.

[2] Instit. de Rer. Divisione, lib. ii, tit. i, § 35; Adams, Ejectment, 4th ed. 386, n. (a)

[3] Kaines' Equity, book iii, ch. i.

[4] Domat, I, 272, book iii, tit. v, § 3. There were, however, before the Revolution, several exceptions to the general principle in France, which will be found noticed by Touillier, in his admirable work, vol. IV, 327, liv. iii, tit. i, ch. iv, § 307, *et seq.* The matter has been put at rest by the Code Napoleon, which declares, Art. 549: "The occupant makes the mesne profits his own only in case he is a *bona fide* possessor; if otherwise, he must return the profits with the thing itself to the true owner. The occupant is regarded as a *bona fide* possessor when he holds as proprietor under a derivative title, of the defect of which he is ignorant. The occupant ceases to be so regarded as soon as the defect of title is known to him."

Louisiana, the jurisprudence of which State has been largely affected by the liberal reasoning and enlightened equity of the civil law.[1] But the common law makes no such distinction, except, as we shall now see, with regard to improvements put on the premises; it looks only to the strict legal title, and the right to recover the mesne profits follows in all cases upon a recovery in ejectment.[2] **

A tenant in common is liable for the mesne profits of land of which he withholds the possession from his cotenants.([a]) Where an action of ejectment is brought against two, and it appears that one of them took possession of the land before the other, mesne profits can be recovered only during the time of their joint possession, in the absence of a statute allowing recovery against them jointly and severally.([b]) Where a mortgagee obtains a decree of foreclosure, in which no provision is made as to the disposition of the rents and profits, the mortgagor is entitled to them.([c])

§ 907. **Damages given by the early law.**—* In an action for mesne profits, the plaintiff, as a general rule, recovered the annual value of the land from the time of the accruing of his title, or from the time of such title accrued as laid in the declaration in the ejectment suit, if he relied on the record in that suit to establish his re-

[1] The Civil Code of Louisiana asserts, Art. 502: "The products of the thing do not belong to the simple possessor, and must be returned with the thing to the owner who claims the same, unless the possessor held it *bona fide*." Art. 503: "He is a *bona fide* possessor who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of; he ceases to be a *bona fide* possessor from the moment these defects are made known to him, or are declared to him by a suit instituted for the recovery of the thing by the owner."

[2] Green *v.* Biddle, 8 Wheat. 1, 80; Camp *v.* Homesley, 11 Ired. 211.

([a]) Backus *v.* Chapman, 111 Mass. 386; Falconer *v.* Roberts, 88 Mo. 574.

([b]) Ashmead *v.* Wilson, 22 Fla. 255.

([c]) Gilman *v.* Illinois & M. T. Co., 91 U. S. 603.

covery. But the jury were not confined in their verdict to the mere rent of the premises, but might give such extra damages as they thought the particular circumstances of the case demanded.[1] ** * What these additional damages should be was not at first clearly laid down. In an early case in England, it was said,[2] "The plaintiff is not confined in this case to the very mense profits only, but he may recover for his trouble. I have known four times the value of the mense profits given by a jury in this sort of action of trespass; if it were not to be so sometimes, complete justice could not be done to the party injured." So where[3] an action of trespass for mense profits was brought, and bankruptcy was pleaded: on demurrer it was admitted that bankruptcy was no bar to demands for torts in general, but it was insisted that the claim here was in substance for the annual value of the land. But judgment was given for the plaintiff, Lord Mansfield saying: "The plaintiff goes for the whole damages occasioned by the tort"; and Mr. J. Buller said: "The damages here are as uncertain as in an action of assault."

"There are certainly some cases," says Mr. Runnington,[4] "in which the jury are not bound by the amount of the rent, but may give extra damages, and after judgment by default the costs in ejectment are recoverable, and are therefore usually declared for as damages in the action for mesne profits." And so the Supreme Court of New York:[5] "The damages in the action for mesne profits are not limited to the rent. Extra damages may be given." "As to the amount of damages," said Washington, J., on the Pennsylvania Circuit,[6] "the jury are the only proper judges; there is no general rule, and the quantum depends on the circumstances of the case."

[1] Adams, Ejectment,* 391.
[2] Goodtitle *v.* Tombs, 3 Wils. 118.
[3] Goodtitle *v.* North, 2 Doug. 584.
[4] Ejectment 439.
[5] Dewey *v.* Osborn, 4 Cow. 329.
[6] Brown *v.* Galloway, Pet. C. C. 291.

And so in Pennsylvania, the jury were told at Nisi Prius, that they might give interest from the time of the commencement of the suit; and on motion for a new trial, the court said: "As to the measure of the damages, the court gave in this respect as favorable a construction as the case could possibly admit of. It would not have been error in the court to have left it to the discretion of the jury to have allowed the plaintiff more than interest upon the amount of the mesne profits. The jury are not confined in their verdict to the mere rent of the premises, although the action is said to be brought to recover the rents and profits of the estate; but may give such extra damages as they may think the particular circumstances of the case demand." [1]

These *dicta* are evidently very loose;** and * it is plain that the measure of compensation which we are now considering, has been involved in confusion by the technical character of our forms of action. "The *dicta* on the subject," says Gibson, C. J., in Pennsylvania, "seem to have been predicated by judges who had no precise idea of it; for they have not defined it by any landmarks." [2] The action of trespass being one of *tort*, admits of any evidence in aggravation; and therefore, in one sense, it is correct to say, that the damages in this proceeding are entirely at large and under the control of the jury. But, on the other hand, there is nothing necessarily in the action of the nature of a trespass. The property may have been withheld, and the rents received, in entire good faith. In this case, the allegations of force, etc., are purely fictitious; and it certainly never would be tolerated, on such facts, that the jury should give any damages beyond the actual value of the income.**

[1] Drexel *v.* Man, 2 Pa. St. 271.

[2] Alexander *v.* Herr, 11 Pa. 537.

§ 908. General rule in actions to recover mesne profits.— The general rule settled by modern decisions is that the compensation is to be measured by the annual income of the land, during the time possession is withheld.([a]) Thus Ashurst, J., in Utterson *v.* Vernon,[1] said: "The action for mesne profits, though in form it is an action of trespass, in effect is to recover the rent." So where the land recovered is uncultivated prairie land, from which no profit ever accrued, nothing can be recovered on account of mesne profits.([b])

It is to be observed that the plaintiff recovers the value of the use of the premises, and not merely what the defendant actually received from his lessee.([c]) The defendant's relations with *his* lessee are irrelevant,([d]) and conversely, recovery cannot be had for the value of some special use to which the plaintiff might have put the property, but only the market value of the use.([e]) The damages should be, not the actual yield or income of the property, but the fair annual value. Where the defendant occupied a mill-site having upon it a steam saw-mill, the rent of the mill and site was the measure;([f]) and

[1] 3 T. R. 539, 547.

([a]) Dormer *v.* Fortescue, 3 Atk. 124; Green *v.* Biddle, 8 Wheat. 1; New Orleans *v.* Gaines, 15 Wall. 624; Larwell *v.* Stevens, 2 McCrary 311; S. C. 12 Fed. Rep. 559; Apalachicola *v.* Apalachicola Land Co., 9 Fla. 340; Averett *v.* Brady, 20 Ga. 523; Grimes *v.* Wilson, 4 Blackf. 331; Searcy *v.* Reardon, 1 A. K. Marsh 1; Drury *v.* Conner, 1 H. & G. 220; Taylor *v.* Taylor, 43 N. Y. 578, 584; Hill *v.* Cooper, 8 Ore. 254; Carman *v.* Beam, 88 Pa. 319; Bains *v.* Perry, 1 Lea 37; Bolling *v.* Lersner, 26 Gratt. 36. "Compensation is the purpose of the action:" Morrison *v.* Robinson, 31 Pa. 456.

([b]) Griffey *v.* Kennard, 24 Neb. 174.

([c]) Kille *v.* Ege, 82 Pa. 102.

([d]) Campbell *v.* Brown, 2 Woods 349; Bolling *v.* Lersner, 26 Gratt. 36.

([e]) McMahan *v.* Bowe, 114 Mass. 140.

([f]) Morris *v.* Tinker, 60 Ga. 466.

where the defendant was in possession of a ferry, the profits of the ferry.(a)

In Starr *v.* Stark,(b) a suit in equity, the rents and profits consisted of mesne profits which the defendant, in an action of ejectment had previously recovered from the plaintiff and was thus compelled to restore. Where the wall of a storeroom and a narrow strip of floor along it belonged to the plaintiff, the yearly rental value of the entire room was allowed to go to the jury as an element to be considered.(c) In Woodhull *v.* Rosenthal,(d) where the plaintiff owned a leasehold interest in the rear part of a city lot, and the defendant in the front part, it was held not error to admit evidence that the rental value of the front part was greater, per square foot, than that of the rear part. The inadequate price paid by the plaintiff for the land cannot, of course, be used to reduce the amount of his recovery.(e) The annual income under prudent management is sometimes stated as the measure.(f)

Not merely the actual receipts, then, are to be recovered, but the income which the land ought to bring.(g) In Massachusetts, where a messuage recovered on a writ of entry was, at and after the time when the defendant's title accrued, subject to a right of homestead in the defendant's grantor and his family, and the house was occupied as a homestead by the grantor's wife, who claimed under that right, although without having had her homestead set off to her, it was held that the rentable value of the

(a) Averett *v.* Brady, 20 Ga. 523; Dunlap *v.* Yoakum, 18 Tex. 582.
(b) 7 Ore. 500.
(c) Jenkins *v.* Means, 59 Ga. 55.
(d) 61 N. Y. 382.
(e) Love *v.* Powell, 5 Ala. 58.
(f) Campbell *v.* Brown, 2 Woods 349; Bolling *v.* Lersner, 26 Gratt. 36.
(g) Campbell *v.* Brown, 2 Woods 349; Kille *v.* Ege, 82 Pa. 102, 112.

part occupied by her should not be included in estimating the clear annual value of the premises for which the tenant was liable.(a)

§ 909. **Recovery measured by the net profits.**—The defendant need of course return only profits in the ordinary sense—that is, the gross receipts, less expenses. Thus, where a ferry was occupied, the defendant was required to return the gross receipts less the expenses of operation.(b) Taxes and expenses of collecting rents may be deducted.(c)

The expenses incurred by the defendant may amount to not merely those necessary to collect or preserve the ordinary profits of the premises, but may be so important and extensive that they become themselves the real source of the profits, and the question then is practically whether a plaintiff can recover the income arising from improvements made by the defendant. It has been held (and very properly) that the value of the use of improvements made by the defendant cannot be recovered.(d) The case is stronger where there would have been no rents at all from the land but for the improvements,(e) or where the improvements have been destroyed by casualty and have imparted permanent value to the land,(f) or where, for other reasons, the defendant cannot claim to set off his expenditures in making the improvements.(g) In Iowa it has been declared that

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(a) Marsh *v.* Hammond, 103 Mass. 146.

(b) Averett *v.* Brady, 20 Ga. 523; Dunlap *v.* Yoakum, 18 Tex. 582.

(c) Raymond *v.* Andrews, 6 Cush. 265.

(d) Jackson *v.* Loomis, 4 Cow. 168; Davis *v.* Louk, 30 Wis. 308.

(e) Adkins *v.* Hudson, 19 Ind. 392; Neale *v.* Hagthrop, 3 Bland, 551, 591. See Ewing *v.* Handley, 4 Litt. (Ky.) 347, 371; Hawkins *v.* King, 1 T. B. Mon. 161; Moore *v.* Cable, 1 Johns. Ch. 385.

(f) Nixon *v.* Porter, 38 Miss. 401.

(g) Tatum *v.* McLellan, 56 Miss. 352.

while the rent recovered should not include the use of improvements (buildings, fixtures, etc.), it should be based upon the value of the land as brought into cultivation by the defendant's efforts and made suitable for new purposes.([a])

This seems, however, to be a departure from principle. For the expenditure of labor on the land is as much a permanent expenditure as is that of money; and if no allowance is made to the defendant for the value of his services, the error is committed of refusing payment for the expenditure which has gone into the land and produced the increased permanent value, and at the same time charging for the use of the land as thereby increased in value. This injustice has never been committed. In the cases where, contrary to the general rule, the use of improvements has been included in the rent recovered,([b]) the fact that the defendant was allowed for his improvements was the ground of recovery. It may be added, that where this exception is adopted and the defendant pays rent for improvements, while receiving allowance for their cost, he should receive interest on his expenditures up to the time of trial.([c])

§ 910. **Waste or injury to the freehold.**—Compensation for waste or dilapidation may be recovered in an action for mesne profits,([d]) as well as compensation for injury

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([a]) Dungan *v.* Von Puhl, 8 Ia. 263; see Wolcott *v.* Townsend, 49 Ia. 456.

([b]) Bell *v.* Barnet, 2 J. J. Marsh 516; Miller *v.* Ingram, 56 Miss. 510; Phillips *v.* Chamberlain, 61 Miss. 740.

([c]) See Evetts *v.* Tendick, 44 Tex. 570; Sedgwick & Wait, Trial of Title, etc., 2d ed., § 678.

([d]) Field *v.* Columbet, 4 Sawy. 523; Alsop *v.* Peck, 2 Root 224; Ashmead *v.* Wilson, 22 Fla. 255; Raymond *v.* Andrews, 6 Cush. 265; Emrich *v.* Ireland, 55 Miss. 390; Lee *v.* Bowman, 55 Mo. 400; Morrison *v.* Robinson, 31 Pa. 456; *contra*, Walker *v.* Hitchcock, 19 Vt. 634.

to the premises.(a) Thus for trespass, such as cutting timber, pulling down fences and injuring crops,(b) or for building a road across the premises.(c) But no recovery can be had on account of a diminution in the value of the property for which the defendant is not chargeable.(d) Thus, where a house on the premises was burned without fault of the defendant during the period of dispossession, the value of the house cannot be recovered.(e)

It has sometimes been held that for damage in the nature of waste and trespass a separate action must be brought;(f) but these cases are exceptional, and have nothing on principle to commend them. No doubt such damages must be specially alleged.

§ 911. **Period during which compensation may be recovered.**—*As to the time for which the defendant is liable, each occupant is answerable for the time he has been in possession.[1] ** And a defendant cannot be charged in damages for a period when he was not in possession in fact or in judgment of law, either personally or by agent or tenant,(g) and, therefore, a defendant who

[1] Holcomb *v.* Rawlyns, Cro. Eliz. 540; Morgan *v.* Varick, 8 Wend. 587.

(a) Cooch *v.* Geery, 3 Harr. 423; Johnson *v.* Futch, 57 Miss. 73; Gas Light Co. *v.* Rome, W. & O. R.R. Co., 51 Hun 119; Huston *v.* Wickersham, 2 W. & S. 308.

(b) Hillman *v.* Baumbach, 21 Tex. 203; Bonner *v.* Wiggins, 52 Tex. 125.

(c) Lippett *v.* Kelley, 46 Vt. 516, 523.

(d) Marvin *v.* Prentice, 94 N. Y. 295, 301 (*semble*).

(e) Willis *v.* Morris, 66 Tex. 628.

(f) Woodruff *v.* Garner, 27 Ind. 4, 8; Bottorff *v.* Wise, 53 Ind. 32; Pacquette *v.* Pickness, 19 Wis. 219.

(g) Doe *v.* Harlow, 12 A. & E. 40, 42 n.; Hunter *v.* Britts, 3 Camp. 455; Burne *v.* Richardson, 4 Taunt. 720; Girdlestone *v.* Porter (K. B. M. T. 39 Geo. 3) Woodf. L. & T. 511; Chirac *v.* Reinicker, 11 Wheat. 280; Gaines *v.* New Orleans, 17 Fed. Rep. 29; Gilman *v.* Gilman, 111 N. Y. 265; Tyler, Ejectment, 841.

interferes in the ejectment merely to maintain the title, not being a trespasser, is not liable for mesne profits.(a) A defendant is, therefore, not liable for profits taken, prior to his entry, by those under whom he claims title.(b)

In Tennessee, where land is sold at execution sale, and the purchaser takes possession, and the land is redeemed, the owner is not entitled to rent or damages for waste before the redemption, but he is entitled to rent for the time he was wrongfully kept out of possession after redemption.[1] The judgment in ejectment is not conclusive as to the length of time the defendant has been in possession.(c) A tenant in common cannot recover for a period during which the defendant's occupancy was not adverse,(d) or during which no ouster has been proved.(e)

§ 912. **Time from which compensation may be recovered.** —Mesne profits are to be computed only from the time when the plaintiff's title accrued.(f) Thus, an execution purchaser recovers only from the date of the sheriff's deed.(g) Heirs or devisees recover only from the time of the ancestor's or testator's death.(h) If no ouster is

[1] Kannon *v.* Pillow, 7 Humph. 281.

(a) Eastwick *v.* Saylor, 85 Pa. 15.

(b) Gardner *v.* Granniss, 57 Ga. 539.

(c) Aslin *v.* Parkin, 2 Burr. 665, 668; Dodwell *v.* Gibbs, 2 C. & P. 615; Bailey *v.* Fairplay, 6 Binn. 450; Sopp *v.* Winpenny, 68 Pa. 78; Miller *v.* Henry, 84 Pa. 33; Lippett *v.* Kelley, 46 Vt. 516. *Contra*, Shotwell *v.* Boehm, 1 Dall. 172. But if the plaintiff goes back of the time laid in the ejectment suit, the defendant as to that time is not concluded from proving himself rightfully in possession. Huston *v.* Wickersham, 2 W. & S. 308; Kille *v.* Ege, 82 Pa. 102.

(d) Carpentier *v.* Mendenhall, 28 Cal. 484.

(e) Miller *v.* Myers, 46 Cal. 535.

(f) Adams, Ejectment, 4th ed., 389; Sedgwick & Wait, Trial of Title to Land, 2d ed., § 663; Danziger *v.* Boyd, 54 N. Y. Super. Ct. 365.

(g) Clark *v.* Boyreau, 14 Cal. 634.

(h) Cavender *v.* Smith, 8 Ia. 360; Hotchkiss *v.* Auburn & R. R.R. Co., 36 Barb. 600; King *v.* Little, 77 N. C. 138.

shown, recovery should date from the institution of the suit.[a] A mortgagee recovers rents and profits from the mortgagor's assignee from the time of notice to quit, or in the absence of notice from the date of the writ.[b]

§ 913. **Time to which compensation may be recovered.**—An executor recovers, if at all, to the date of the testator's death.[c] A tenant in common recovers from his co-tenant only to the time reasonably necessary for taking possession.[d] A defendant who abandons the premises is not liable, unless the abandonment was secret, for profits subsequently accruing.[e] If the defendant remains in possession, damages should be awarded to the date of the verdict or award.[f]

§ 914. **Statute of limitations.**—The right to recover mesne profits extends back for six years only, or such other period as is named in the statute of limitations, if the statute be pleaded.[g] But if no statute of limitations is applicable they can be recovered for the whole period of occupation.[h] In New York it has been held that

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[a] Miller *v.* Myers, 46 Cal. 535.

[b] Lyman *v.* Mower, 6 Vt. 345.

[c] Hotchkiss *v.* Auburn R.R. Co., 36 Barb. 600; King *v.* Little, 77 N. C 138. But where the executor is empowered to sell the land, he may recover mesne profits both before and after the death of the testator. Blight *v.* Ewing, 26 Pa. 135.

[d] Hare *v.* Fury, 3 Yeates 13, where one month was deemed a reasonable time.

[e] Gilman *v.* Gilman, 111 N. Y. 265; Mitchell *v.* Freedley, 10 Pa. 198.

[f] Roscoe II. 308; Pilfold's Case, 10 Rep. 115b, 117a; Pendergast *v.* McCaslin, 2 Ind. 87; Bell *v.* Medford, 57 Miss. 31; Danziger *v.* Boyd, 120 N. Y. 628; McCrubb *v.* Bray, 36 Wis. 333.

[g] Adams, Ejectment, 4th ed., § 386; Ringhouse *v.* Keener, 63 Ill. 230; Gatton *v.* Tolley, 22 Kas. 678; West *v.* Hughes, 1 H. & J. 574; Morgan *v.* Varick, 8 Wend. 587; Jackson *v.* Wood, 24 Wend, 443; Hill *v.* Meyers, 46 Pa. 15.

[h] New Orleans *v.* Gaines, 15 Wall. 624. In New York, by statute, the recovery is limited to six years, whether the statute of limitations be pleaded or not: Jackson *v.* Wood, 24 Wend. 443; Grout *v.* Cooper, 9 Hun 326.

mesne profits can be recovered for only six years before the hearing at which the plaintiff's right is established, since the proceedings to recover mesne profits begin then;(a) but in Rhode Island it is held, with more propriety, that when the mesne profits are recovered in the same proceeding in which the right to the land is established, mesne profits may be recovered for the time limited before the suit is commenced.(b)

A plaintiff has been allowed to show that a deficiency of profits in one or more of the six years was made up by an excess of profits in excluded years. But a defendant is not allowed to increase his claim for expenses by proving expenditures during years for which, by availing himself of the statute of limitations, he is not obliged to restore profits.(c)

§ 915. **Allowance for improvements.**—* The action for mesne profits is everywhere held to be a liberal and equitable action, and one which will allow of every equitable kind of defense.[1] Among the most important considerations that a defendant can urge, in answer to the claim for the rents and profits received by him, is that which the common law has, to a certain extent, adopted from the civil law, and which grows out of permanent improvements made by him upon the premises during his occupancy. The civil law treated the occupant in good faith with lenity.[2] The reasoning of the civilians has so

[1] Murray *v.* Gouverneur, 2 Johns. Cas. 438.

[2] Lord Kaims says, book iii, ch. i, 276: "It is a maxim suggested by nature, that reparations and meliorations bestowed upon a house or upon land, ought to be defrayed out of the rents"; and so says the Roman law. Sumptus in prædium quod alienum esse apparuit, a bona fide possessore facti, neque ab eo qui prædium donavit, neque a domino peti possunt, verum exceptione

(a) Budd *v.* Walker, 9 Barb. 493; Gas-Light Co. *v.* Rome, W. & O. R.R. Co., 51 Hun 119.

(b) Herreshoff *v.* Tripp, 15 R. I. 92.

(c) Ewalt *v.* Gray, 6 Watts 427.

far obtained in many of our tribunals, that a *bona fide* occupant of lands is allowed to mitigate the damages in the action brought by the rightful owner, by offsetting the value of his permanent improvements made in good faith, to the extent of the rent and profits claimed ; (a) ** and in our own ancient real actions, the improvements of the tenant appear to have always been the subject of set-off or recoupment.[1] The set-off cannot, however, go beyond the value of the rent and profits ; the defendant is never allowed to recover a balance.

This principle, however, properly applies only to the case of a *bona fide* possessor, or one without notice, and does not touch that of a person who, being apprised of a claim of better title and with full notice, and even after suit brought goes on to apply the mesne profits to permanent improvements. It seems very dangerous to make a compulsory allowance for such an application of funds to property which the defendant is fully apprised will be claimed by another. Such expenditure should be made, it would seem, at the occupant's peril. But this distinction is by many courts not adverted to, and the decisions must, therefore, be distinguished accordingly.

§ 916. **Good faith required.**—It is usually held that allowance for improvements will be granted only to a defendant who acted in good faith,(b) supposing himself to

doli posita, per officium judicis æquitatis ratione servantur, scilicet si fructuum ante litem contestatum perceptorum summam excedunt. Etenim, admissâ compensatione, superfluum sumptum meliore prædio facto dominus restituere cogitur. L. 48, de Rei Vindicatione.

[1] "Damage of 40*s.* and no more was found by the assize, because the land sown and the house well amended, and so recouped the damage." Viner's Abr. tit. Discount, where see many other cases in the same connection. See also, Coulter's Case, 5 Co. 30, and Bro. tit. Damages.

(a) Marie *v.* Semple, Addison 215 ; Hylton *v.* Brown, 2 Wash. C. C. 165 ; *contra*, Jacks *v.* Dyer, 31 Ark. 334.

(b) Story, Equity, § 799*a* ; Green *v.* Biddle, 8 Wheat. 1 ; Bright *v.* Boyd, 1 Story 478 ; Campbell *v.* Brown, 2 Woods 349 ; White *v.* Moses, 21 Cal. 34 ;

be the true proprietor of the land, and ignorant that his title is contested by any one claiming a better right to it.[a] Where the defendant was a *bona fide* holder under a void assessment, he was allowed to show the value of improvements made by him, though it was said that profits received before the demise laid in the complaint should first be deducted from the improvements.[b]

In Jackson *v.* Loomis,[c] however, the Supreme Court of New York * allowed improvements made after suit brought by the legal owner, and during its pendency, to be given in evidence for the purpose of mitigating damages. The distinction between improvements made before and after notice of suit brought, does not, however, appear to have been clearly taken; and the court relied on the case above cited in the Supreme Court of the United States,[d] where the point was not even raised.** The principle of these cases seems to have been that the defendant had not received all the mesne profits, since he had spent part of them for the benefit of the estate. That at least is the most logical principle suggested. The ob-

Gill *v.* Patten, 1 D. C. (1 Cr. C. C.) 465; Davis *v.* Smith, 5 Ga. 274; Parsons *v.* Moses, 16 Ia. 440, 445; Whitledge *v.* Wait, Sneed (Ky.) 335; Dothage *v.* Stuart, 35 Mo. 251; Murray *v.* Gouverneur, 2 Johns. Cas. 438; Putnam *v.* Ritchie, 6 Paige 390, 404; Bedell *v.* Shaw, 59 N. Y. 46; Wood *v.* Wood, 83 N. Y. 575 (*semble*). In the following cases the requirement of good faith was not expressly made, but the facts showed a claim by the defendant in good faith. Turnipseed *v.* Fitzpatrick, 75 Ala. 297; Oldham *v.* Woods, 3 T. B. Mon. 47; Worthington *v.* Young, 8 Oh. 401.

[a] Green *v.* Biddle, 8 Wheat. 1.

[b] Bedell *v.* Shaw, 59 N. Y. 46.

[c] 4 Cow. 168. In Averett *v.* Brady, 20 Ga. 523, a mere trespasser was allowed to deduct improvements. At the present day this discussion has not a very practical bearing, as the statutes of the different States generally provide for an assessment for betterments. Wherever there is no special provision, and such improvements are allowed, it would seem that the proper rule is the increased market value of the premises on account of the improvements.

[d] Green *v.* Biddle, 8 Wheat. 1.

jection to this is, that it is treating the action for mesne profits as an accounting in equity for profits received. It is rather an action for damages caused by the detention of the property, and those damages are the same whether improvements have been made or not.[a] The courts, in the cases cited, put the doctrine on equitable grounds, but they do not state any head or principle of equity under which it comes. A conclusive objection, it would seem, to the doctrine is, that the defendant has suffered by his own wrong. The plaintiff should not be required to pay for the erection of buildings where he has not contracted to do so, and has not been guilty of any laches.

§ 917. **For what improvements allowance is made.**—The improvements must be of a lasting and valuable nature,[b] and no allowance is made for improvements which were not necessary for the profitable enjoyment of the land.[c] The allowance for improvements is measured by the benefit the plaintiff would receive from them.[d]

§ 918. **Payment of necessary expenses by the defendant.**—The payment of taxes by the defendant presents itself in several aspects. Such payments cannot be recovered as expenditures for the improvement of the property. It is generally agreed that such payments are properly included in those expenses which the defendant may deduct from the gross profits of the land.[e]

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[a] In Cawdor *v.* Lewis, 1 Y. & C. 427, where the defendant had expended money on the premises, an injunction was granted to restrain the suit at law, on the ground that no right of set-off existed in the action for mesne profits.

[b] Ringhouse *v.* Keener, 63 Ill. 230; Whitledge *v.* Wait, Sneed (Ky.) 335; Oldham *v.* Woods, 3 T. B. Mon. 47; Worthington *v.* Young, 8 Oh. 401.

[c] Wykoff *v.* Wykoff, 3 W. & S. 481.

[d] McMurray *v.* Day, 70 Ia. 671.

[e] Semple *v.* Bank of British Columbia, 5 Sawy. 394, 403; Ringhouse *v.* Keener, 63 Ill. 230.

A third question, however, involving a different principle, often arises. When there are no mesne profits, may the defendant set up a counter-claim for taxes paid by him? It is really a question of whether the defendant could in an independent action recover for the money thus paid for the benefit of the plaintiff's land. Under ordinary circumstances, such payments by one occupying the position of a disseizor are not to be protected by the law, and cannot be recovered or set off.(a) But where the defendant was a transferee from a vendor whose vendee brought suit and recovered the land, the defendant being declared trustee, the defendant was held to be entitled, under the circumstances, to reimbursement for taxes paid to protect the title.(b) A payment of ground rent by the defendant was allowed to be deducted from the sum of damages, as a payment which the plaintiff would himself have had to pay;(c) and so for the same reason was the expense of improvements ordered by a board of health.(d)

§ 919. **Interest on mesne profits.**—Interest is allowed on mesne profits as damages for delay in paying them.(e) Interest on loss by depreciation caused by waste should run from the time when the plaintiff was let into possession to the date of the assessment or report.(f) And

(a) Homestead Co. *v.* Valley R.R. Co., 17 Wall. 153; Napton *v.* Leaton, 71 Mo. 358; Marvin *v.* Lewis, 61 Barb. 49. In Minnesota, a statute allowing recovery has been held constitutional. Madland *v.* Beuland, 24 Minn. 372; see Flint *v.* Douglass, 28 Kas. 414.

(b) Sherman *v.* Savery, 2 McCrary 107; Duffy *v.* Donovan, 52 N. Y. 634.

(c) Doe *v.* Hare, 4 Tyr. 29.

(d) Ringhouse *v.* Keener, 63 Ill. 230.

(e) New Orleans *v.* Gaines, 15 Wall. 624; Jackson *v.* Wood, 24 Wend. 443; Vandevoort *v.* Gould, 36 N. Y. 639; Low *v.* Purdy, 2 Lans. 422; Drexel *v.* Man, 2 Pa. St. 271; Sopp *v.* Winpenny, 68 Pa. 78; Bolling *v.* Lersner, 26 Gratt. 36.

(f) Worrall *v.* Munn, 38 N. Y. 137.

where repairs were made, not only the expense of the repairs, but also interest on such expense is to be deducted from the gross profits.(a) * It seems a general principle that a mortgagee in possession is not to pay interest on rents unless there are special circumstances rendering it equitable that he should do so.[1] **

§ 920. **Costs and counsel fees.**—* The costs of the ejectment suit are also recoverable in this action.[2] Where the ejectment suit has been defended, and the plaintiff's costs taxed, he cannot recover beyond those taxed costs;[3] ** but where judgment in ejectment was obtained by default, reasonable counsel fees were allowed.(b) * So in the King's Bench,[4] the plaintiff was allowed to recover, by way of damages, the costs incurred by him in a court of error in reversing a judgment in ejectment obtained in the first place by the defendant; and Lord Tenterden said: "There can be no doubt that the court of error could not award costs to the plaintiff. But the expenses incurred in the court of error were part of the damages sustained by the plaintiff; and I think that the jury might reasonably consider the costs between attorney and client, as the measure of the damages which he had sustained."[5] **

The same rule as to allowing the costs of the ejectment which was laid down by Lord Mansfield, has been declared in some States in this country;(c) in others,

[1] Breckenridge *v.* Brooks, 2 A. K. Marsh 335; Story *v.* Livingston, 13 Peters 359.

[2] Aslin *v.* Parkin, 2 Burr. 665; Sayer, 88.

[3] Doe *v.* Davis, 1 Esp. 358; Brooke *v.* Bridges, 7 Moore 471; Doe *v.* Filliter, 13 M. & W. 47.

[4] Nowell *v.* Roake, 7 B. & C. 404.

[5] See, also, Symonds *v.* Page, 1 Cr. & J. 29, and Doe *v.* Hare, 2 Dowl. P. C. 245. But in a case where the costs were not included in the verdict, the Court of King's Bench refused to assist the plaintiff. Gulliver *v.* Drinkwater, 2 T. R. 261.

(a) New Orleans *v.* Gaines, 15 Wall. 624.

(b) Doe *v.* Huddart, 4 Dowl. Pr. 437; S. C. 5 Tyr. 846.

(c) Brooke *v.* Bridges, 7 Moore 471; Denn *v.* Chubb, 1 N. J. L. 466;

counsel fees in the ejectment suit are not allowed.(a) Where the two actions are combined in one there can of course be no recovery of counsel fees.

§ 921. Dower.—* Where the husband of a woman is seized of an estate of inheritance and dies, the wife is entitled to the third part of all the lands and tenements whereof he was seized at any time during the coverture, to hold for the term of her natural life.[1] "A dowress," says Mr. Park,[2] "having no right of entry till her dower is assigned, cannot, if an assignment is refused, maintain a possessory action."[3] In England the legal remedy to enforce an assignment of dower is by a writ of dower, *unde nihil habet*, or by a writ of right of dower, upon which, if she obtains judgment, dower is assigned, and ejectment may then be brought. In consequence, however, of the jurisdiction assumed by courts of equity in regard to setting out dower, the prosecution of a writ of dower has become very unusual, except where it is ordered by Chancery to try a disputed title.[4]

"Dower being a real action," says Mr. Park,[5] "no dam-

[1] 2 Black. Com. 129.

[2] A Treatise on the Law of Dower, by John James Park, London, 283.

[3] On a plea of *tout temps prist* to a declaration in dower under the statute of Merton, replication of a demand and refusal to render dower before the writ, rejoiner traversing the demand, and issue thereon found for the demandant, the demandant is entitled to damages from the death of her husband, and not from the date of the demand only. Watson *v.* Watson, 10 C. B. 3.

[4] The writ of right of dower is of rare occurrence if not entirely unknown in this country. 4 Kent's Com. 63.

[5] Park on Dower, 301.

Baron *v.* Abeel, 3 Johns. 481; Patterson *v.* Reardon, 7 Up. Can. Q. B. 326. The plaintiff should be compensated for whatever expense he incurred in good faith in regaining the land by legal means: Doe *v.* Perkins, 8 B. Mon. 198.

(a) Alexander *v.* Herr, 11 Pa. 537; Herreshoff *v.* Tripp, 15 R. I. 92; White *v.* Clack, 2 Swan 230. In Hunt *v.* O'Neill, 44 N. J. L. 564, costs are allowed in the ejectment suit, though judgment is given by default, if it appears that the defendant was in possession; if it does not appear, costs must be obtained in an action for mesne profits.

ages were at the common law recoverable for its detention." "No damages," says Mr. Sayer,[1] "are recoverable, either at the common law or under any statute, in an action of right of dower." But in the action of dower *unde nihil habet*, damages were given by the statute of Merton. This act gave damages to widows who *could not have their dower without plea.* A previous demand was, therefore, necessary, and in an action[2] under this statute, where the jury upon a writ of inquiry assessed damages to the amount of the third part of the value of the land, from the death of the husband to the day of the inquisition, without making deductions for land-tax, repairs, or chief-rents, the inquisition was set aside on the two grounds, that these deductions should have been made, and that the damages should have been assessed to the day of awarding the writ of inquiry only; but on this latter point there are conflicting decisions, and the contrary rule seems now to be established.[3]

It appears that by damages under this statute are to be understood the net profits of the third part of the land subsequent to the death of the husband, or the teste of the original writ after deducting outgoings.(a) So, if the lands are leased for years before marriage, the wife will recover dower not according to the value of the land, but according to the rents; and it follows that if the rent reserved was nominal, no damages, or none but nominal damages, can be recovered.[4] **

* Many other cases have been decided on the statute of Merton, which will be found in Mr. Park's valuable

[1] Ch. 6, p. 23.
[2] Penrice *v.* Penrice, Barnes' Notes, 3d ed., 234.
[3] Pilford's case, 10 Co. 115; Walker and Nevil's case, 1 Leon. 56; Park on Dower, 308, and cases there cited.
[4] Hitchens *v.* Hitchens, 2 Vern. 403.

(a) The rule is the same under the American statutes: O'Ferrall *v.* Simplot, 4 Ia. 381; Rea *v.* Rea, 63 Mich. 257.

treatise above cited; but equity having, as already said, obtained a very extensive control over the subject of dower, it does not appear necessary to do more than to refer to a repository of the authorities which appertain to this branch of the law.[1] **

In New York, the action of ejectment was early substituted for the former legal remedies for the recovery of dower, writs of dower being formally abolished;[2] and, in this action, it is provided, by statute, that "where a widow recovers dower in property of which her husband died seized, she may also recover, in the same action, damages for withholding her dower to the amount of one-third part of the annual value of the mesne profits of the property, with interest, to be computed, where the action is against the heir, from her husband's death, or where it is against any other person, from the time when she demanded her dower of the defendant; and in each case to the time of the trial, or application for judgment, as the case may be; but not exceeding six years in the whole." Such damages are not to be estimated, however, for the use of any permanent improvements made after the death of the husband, by his heirs or by other persons claiming title.[3]

* It is further enacted that where dower is recovered in lands that have been aliened by the heir, the wife shall be entitled, in an action on the case against the heir, to recover her damages for withholding the dower from the time of the husband's death to the time of the alienation, not exceeding six years in all; and any damages so recovered against the heir, or in the dower suit against the heir's

[1] In South Carolina and Ohio, no damages are allowed in a judgment of dower, and the rule prescribed in the statute of Merton is not adopted nor followed. Heyward *v.* Cuthbert, 1 McCord 386; Bank U. S. *v.* Dunseth, 10 Ohio 18.

[2] 2 R. S. 343, § 24; 2 R. S. 304, § 2.

[3] Co. Civ. Proc. § 1600.

grantee, are to be respectively deducted from each other.[1] The provision which gives damages from the time of the husband's death, is an affirmance of the doctrine laid down by the Supreme Court of New York in an early case.[2]

The construction of this statute has been settled ;[3] and it has been held that where lands were aliened by the husband, the value was to be computed as at the time of the alienation, and no more ; and it was further held, that when the widow brings ejectment for dower, although before admeasurement, she is entitled to costs.[4] ** In Massachusetts damages for detention of dower cannot be recovered prior to demand on which action is founded.(*)

§ 922. **Dower in improvements.**—* On this point, independently of any statutory provision, some perplexity exists, and the greatest authorities of American law, Chancellor Kent and Mr. Justice Story, are divided. The authorities, both English and American, were fully examined by Mr. Justice Story, on the Massachusetts circuit ;[5] and the result arrived at by him was that when the heir builds on or otherwise improves the estate, the widow shall have her dower of the improvements, otherwise as against a purchaser ; but that as against the latter the dowress is to have the benefit of any enhanced value of the land between the alienation and the assignment of dower,

[1] Co. Civ. Proc. § 1603. In Virginia, the widow recovers damages against an alienee so far forth as profits are concerned, only from the date of the subpœna. Tod *v.* Baylor, 4 Leigh 498. In Maryland, from the time of the demand and refusal to assign ; Steiger *v.* Hillen, 5 G. & J. 121. In New Jersey, see Woodruff *v.* Brown, 17 N. J. L. 246.

[2] Hitchcock *v.* Harrington, 6 Johns. 290. See, also, Jackson *v.* O'Donaghy, 7 Johns. 247 ; Humphrey *v.* Phinney, 2 Johns. 484 ; Dorchester *v.* Coventry, 11 Johns. 510 ; Dolf *v.* Basset, 15 Johns. 21 ; Shaw *v.* White, 13 Johns. 179 ; Coates *v.* Cheever, 1 Cow. 460.

[3] Walker *v.* Schuyler, 10 Wend. 480.

[4] In Massachusetts, see on this subject Leonard *v.* Leonard, 4 Mass. 533 ; Miller *v.* Miller, 12 Mass. 454 ; Conner *v.* Shepherd, 15 Mass. 164, 167 ; Ayer *v.* Spring, 10 Mass. 80 ; Perry *v.* Goodwin, 6 Mass. 498, 499 ; Leavitt *v.* Lamprey, 13 Pick. 382 ; Stearns *v.* Swift, 8 Pick. 532.

[5] Powell *v.* Monson & B. M. Co., 3 Mason 347.

(*) Whitaker *v.* Greer, 129 Mass. 417.

arising from the general progress and population of the country ; and, if the land has depreciated, she sustains the loss.[1] On the other hand, Chancellor Kent, who critically examined the subject in his Commentaries, declared it to be the ancient and settled rule of the common law, that the widow takes her dower according to the value of the land at the time of the alienation, and not according to its subsequent or improved value ; (a) though he assented as to the right of the dowress to be allowed for increased value arising from extrinsic or general causes.[2] In this conflict of authorities, we can only state the doubt as it exists.[3] **

[1] Leggett *v.* Steele, 4 Wash. C. C. 305 ; Coke's Littleton, 32 *a* ; Perkins, Dower, §§ 328, 329 ; Bacon's Abr. Dower, B. 5 ; Gilbert's Tenures ; Gore *v.* Braizer, 3 Mass. 523, 534 ; Catlin *v.* Ware, 9 Mass. 218. But in New York the point seems doubtful. Humphrey *v.* Phinney, 2 Johns. 484 ; Dorchester *v.* Coventry, 11 Johns. 510 ; Shaw *v.* White, 13 Johns. 179 ; Hale *v.* James, 6 Johns. Ch. 258 ; Roper, Husband and Wife, ch. 9, § 2, 346, 347. In Pennsylvania and Ohio, Mr. Justice Story's doctrine is upheld. Dunseth *v.* Bank of the U. S., 6 Ohio 76 ; Thompson *v.* Morrow, 5 S. & R. 289.

[2] 4 Kent Com. 65.

[3] See Tod *v.* Baylor, 4 Leigh 498, in Virginia, which excludes improvements. Wilson *v.* Oatman, 2 Blackf. 223 ; Mahoney *v.* Young, 3 Dana 588 ; Wall *v.* Hill, 7 Ib. 172 ; Wooldridge *v.* Wilkins, 3 Howard (Miss.) 360. In Virginia, the act, 1 Rev. Code, ch. 118, § 1, 468, which authorizes the recovery of damages, in writs of right, intends such damages as may be recovered in actions of trespass for mesne profits. Purcell *v.* Wilson, 4 Gratt. 16. See Garrard *v.* Tuck, 8 C. B. 231 (dower *unde nihil habet*), where it was held that the exact number of acres of land in respect of which dower is demanded is not material in a writ and count in dower. And see the same case as to the effect of outstanding terms, and setting aside and quashing writs of error.

(a) Such is the rule in Missouri, where in an action for deforcement of dower, the jury, after deducting the taxes, if the land has been reasonably used by the owner, should find from the evidence what was its reasonable yearly net value without reference to any improvements, and allow the plaintiff one-third of the net sum. Thomas *v.* Mallinckrodt, 43 Mo. 58 ; O'Flaherty *v.* Sutton, 49 Mo. 583 ; Griffin *v.* Regan, 79 Mo. 73 ; Rannels *v.* Washington Univ., 96 Mo. 226.

CHAPTER XXXI.

THE MEASURE OF DAMAGES FOR WRONGFUL INTERFERENCE WITH REAL PROPERTY.

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General Principles.

§ 923. Injuries to real property, how compensated.— * We have already seen,[1] when treating of the subject of

[1] See Ch. III. So in Texas, Carter *v.* Wallace, 2 Tex. 206.

nominal damages, that every unauthorized entry on the real estate of another, whether actual injury be or be not thereby inflicted, lays the foundation for a claim to at least nominal damages. So, says the Supreme Court of Connecticut,[1] "An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. For the vindication of every right there is a remedy. Where, therefore, there has been a violation of a right, the person injured is entitled to an action. If he is entitled to an action he is entitled to at least nominal damages, or else he would not be entitled to a recovery. Such damages are given in order to vindicate the right which has been invaded; and such further damages are awarded as are proper to remunerate him for any specific damage which he has sustained. It is upon this principle that a person may sustain an action of trespass for an unauthorized entry on his land, although he shows no actual specific damage to have thereby accrued to him; or even although the defendant may prove that such act was beneficial to the plaintiff."([a]) And we have also considered the rules of compensation where the possession of real property has been wrongfully withheld. The present division of our subject is consequently reduced to narrow limits.

As a general rule, the remedy for illegal entries upon real estate, or interference with its enjoyment, is either by an action of trespass, or trespass on the case, or proceedings as for nuisance; in all these proceedings the rules are analogous, and the measure of damages is the amount of injury directly resulting from the wrong complained of.**

[1] Parker *v.* Griswold, 17 Conn. 288, 302.

([a]) Sanderlin *v.* Shaw, 6 Jones 225; Murphy *v.* Fond du Lac, 23 Wis. 365.

§ 924. **Permanent and continuing torts.**—We have already examined ([a]) the distinction between a continuing and a permanent tort. The general rule has been seen to be that where the result of a single wrongful act is an injury the effects of which will continue indefinitely, all damages, both past and prospective, may be recovered; but when the wrongful act produces a state of affairs, every moment's continuance of which is a new tort, recovery can be had only for damages caused by the continuance of the tort *to the date of the writ.*

"Every continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie."[1] Blackstone,[2] speaking of the same subject, says: "Very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it."[3] It follows, therefore, that where the wrong is regarded as completed and not as continuing, damages can be recovered only for the wrong as so defined and limited. For example, a trespass which results in an ouster is but a single trespass; and until another entry has been made by the plaintiff, he can recover for the single trespass only.[4] On the other hand, a nuisance continues momentarily, and a separable wrong occurs each moment; so that damages may be recovered up to the time of bringing action.([b])

[1] 3 Black. Com. 220; Vedder *v.* Vedder, 1 Denio 257. So, also, in New Jersey. Delaware & Raritan Canal Co. *v.* Wright, 21 N. J. L. 469.

[2] 3 Bl. Com. ch. xiii.

[3] "If the party, against whom a verdict in an action of this kind has been recovered, does not abate the nuisance, another action may be brought for continuing the nuisance, in which the jury will be directed to give large damages." 2 Selw. N. P. 1130.

[4] Holcomb *v.* Rawlyns, Cro. Eliz. 540; Monckton *v.* Pashley, 2 Ld. Raym. 974; s. c. 2 Salk. 638; 3 Bl. Com. 210; Case *v.* Shepherd, 2 Johns. Cas. 27; Holmes *v.* Seely, 19 Wend. 507. And so in Ohio: Rowland *v.* Rowland, 8 Ohio 40. And in Kentucky: Shields *v.* Henderson, 1 Lit. 239.

([a]) §§ 91–95.

([b]) Hughes *v.* Anderson, 68 Ala. 280; Ford *v.* Santa Cruz R.R. Co., 59 Cal. 290; Cole *v.* Sprowl, 35 Me. 161; Benson *v.* Chicago & A. R.R. Co., 78 Mo. 504; Blunt *v.* McCormick, 3 Den. 283; Fettretch *v.* Leamy, 9 Bosw. 510;

Thus it is held that if the act done is necessarily injurious and is of a permanent nature, the party injured may at once recover his damages for the whole injury; but if the act done is not necessarily injurious, or its continuance is contingent, the plaintiff can recover damages to the date of his writ only.(a) But, on the other hand, if the injury is of a nature to be permanent, entire damages may be recovered.(b) So where the defendant made unauthorized use of the plaintiff's party wall by inserting in it girders and beams, which formed part of a building erected by the defendant, it was held that the plaintiff could recover entire damages, as for permanent use of the wall.(c) So where the defendant maintained a brothel next the plaintiff's dwelling-house, damages were awarded for the permanent depreciation in value of the plaintiff's property.(d) The question whether a tort is or is not permanent is one of fact, to be decided by the circumstances of each case.

Duncan *v.* Markley, 1 Harp. 276. See § 91. It is this distinction which governs the case of Vedder *v.* Vedder, 1 Den. 257. The plaintiff had a right of action against the defendant for a tortious entry by the latter on his land and committing a nuisance thereon, from which damages ensued. A release was given, and it was held that this discharge extinguished all right of action not only for the original injury and damages up to the time the release was given, but for all future damages; but that if the defendant had placed the nuisance on his own land, and the plaintiff's demand was for consequential damage only, a discharge of the plaintiff would not have extinguished the right of action for future damages.

(a) Troy *v.* Cheshire R.R. Co., 23 N. H. 83. In an action for injury to property caused by a mill which was erected near by, throwing dust, etc., on the premises, evidence of dust thrown subsequently to the commencement of the action was excluded, the court saying that if the injury done had been permanent and not connected with the subsequent acts, all damage, both before and after suit, could have been recovered; but that when the subsequent damages were produced by subsequent acts, those acts were not proper criteria of damage done before suit, which could alone be recovered in such an action. Cooper *v.* Randall, 59 Ill. 317.

(b) §§ 92–95.

(c) Ritter *v.* Sieger, 105 Pa. 400.

(d) Givens *v.* Van Studdiford, 72 Mo. 129, affirming 4 Mo. App. 498.

The presumption is, however, that a wrong will not continue, and therefore that a tort will not be a permanent one.[a]

Where an action is brought for an injunction against the continuance of a nuisance, or for abatement by some other method, in order not to make another action necessary, damages are recovered to the time the nuisance is abated, or to the time of trial, not merely to the beginning of the action.[b]

§ 925. **Loss of support of land.**—The question of the permanence of injury has been much discussed in actions brought for the loss of support of land. Where the defendant by digging in his own land causes the plaintiff's land to fall, the wrongful act is not the excavation, but the act of allowing the plaintiff's land to fall. Consequently, whenever there is a fall of the land there is a new tort. The case is the same where the plaintiff has an easement of support for a structure, which the defendant fails to support.

It is clear that a claim for damages caused by a new fall of the land is not barred by a recovery of damages for a previous fall. The injury is not a permanent one, in the sense that entire damages should be recovered for all falls likely to be caused by a single excavation. Recovery can be had only for damages caused by such falls of the land as occurred previously to bringing the action.[c] In Mitchell *v.* Darley Main Colliery Co.,[d]

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[a] Savannah & O. C. Co. *v.* Bourquin, 51 Ga. 378.

[b] Fritz *v.* Hobson, 14 Ch. D. 542; Beir *v.* Cooke, 37 Hun 38; Comminge *v.* Stevenson, 76 Tex. 642.

[c] Darley Main Colliery Co. *v.* Mitchell, 11 App. Cas. 127, affirming Mitchell *v.* Darley Main Colliery Co., 14 Q. B. Div. 125, and overruling Lamb *v.* Walker, 3 Q. B. D. 389; McGuire *v.* Grant, 25 N. J. L. 356; Snarr *v.* Granite Curling & Skating Co., 1 Ont. 102; see § 91.

[d] 14 Q. B. Div. 125, 134.

in the Court of Appeal, Brett, M. R., in reply to the argument that the cause of the new fall being the same as that of the previous fall, the action was barred, said: "It may be argued that the causa causans is not the same. The causa causans of the first is the excavation; the causa causans of the second is, as a matter of fact, the excavation unremedied, or the combination of the excavation and of its remaining unremedied." And to the same effect Lord Fitzgerald in the House of Lords said: [a] "There was a complete cause of action in 1868, in respect of which compensation was given, but there was a liability to further disturbance. The defendants permitted the state of things to continue without taking any steps to prevent the occurrence of any future injury. A fresh subsidence took place, causing a new and further disturbance of the plaintiff's enjoyment, which gave him a new and distinct cause of action." But though each new fall gives rise to a new action, and in that sense therefore the injury is a continuing one, yet recovery must be had in a single action for the entire damage, past and prospective, caused by the fall for which action is brought.[b]

§ 926. **Recovery by owner of limited interest.**—We have seen [c] that the owner of a limited interest in land recovers such damages as have been caused to his own interest in the land. Thus a lessee recovers the whole amount of the injury, if it was in the nature of a temporary injury the effect of which must pass away before the end of the lease; while if the effect of the injury would be felt after the termination of the lease, the lessee should

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[a] 11 App. Cas. 127, 151.

[b] Maysville *v.* Stanton, 14 S. W. Rep. 675 (Ky.); Rockland Water Co. *v.* Tillson, 69 Me. 255; Conlon *v.* McGraw, 66 Mich. 194.

[c] §§ 69–75.

recover the diminished value of the lease, leaving the reversioner to recover the injury to the reversion.(a) Where the injury renders immediate repairs necessary the tenant may recover the cost of such repairs, in the absence of evidence of a contract by the landlord to repair,(b) and of course if the tenant were under contract with the landlord to repair.(c) So in an action for diverting water from a leased mill, the tenant recovers the diminution in the value of use of the water during the term, the landlord the injury to the reversion.(d)

A mortgagee recovers the diminution in value of his security; (e) and each mortgagee, where there are more than one, may sue and recover the damages he has sustained.(f)

§ 927. **Consequential damages.**—* In trespass *quare clausum*, the plaintiff has been allowed to give evidence of damage to his crop, occasioned by reason of the defendant driving away his negroes.(g) ** Where a plaintiff's business was broken up through injury to his house resulting from excavations on an adjoining lot, it was held he could recover for loss of profits.(h) * So in trespass for the entry of diseased cattle, damage from infection may be stated in aggravation; and so in Connecticut, in an action of trespass *quare clausum fregit*, where the defendant's sheep, while trespassing on the plaintiff's land, mingled with his sheep and communicated to them a

(a) §§ 71, 74.

(b) Buddin *v.* Fortunato, 10 N. Y. Suppl. 115; Weston *v.* Gravlin, 49 Vt. 507.

(c) Walter *v.* Post, 6 Duer 363.

(d) Halsey *v.* Lehigh V. R.R. Co., 45 N. J. L. 26.

(e) § 73.

(f) Schalk *v.* Kingsley, 42 N. J. L. 32.

(g) Johnson *v.* Courts, 3 H. & McH. 510; *accord.* Gray *v.* Waterman, 40 Ill. 522.

(h) Shafer *v.* Wilson, 44 Md. 268.

dangerous disease of which many died, it was held that the plaintiff might recover for the loss of his sheep as well as the breach of his close, and that the defendant's knowledge of the existence of the disease might properly be considered by the jury in estimating damages.[a] **

§ 928. **Inevitable loss through other causes.**—In an action in the nature of trespass *q. c. f.* to recover damages for the plaintiff's house and furniture which were destroyed by a fire-warden for the purpose of staying a conflagration, it was said that the jury should estimate the value of the property with reference to the peril to which it was exposed, and give nominal damages only for that which could not have been saved.[b] In Maine there is a statute which gives the owner of property destroyed by a mob, a claim against the town for the injury. The value is taken at the time of the destruction. The fact that a destroyed building might have been indicted as a nuisance, cannot be shown in mitigation of damages.[c] Where a right to support exists, a party defendant, whose excavations have caused the plaintiff's building to fall, can show the defective construction of the building in reduction of damages, but such defective construction will not be a bar to the action.[d]

§ 929. **Aggravation.**—* If the defendant, while a trespasser on the plaintiff's land, commits any other distinct trespass for which a separate action would lie, yet such acts of trespass and their consequences may be alleged and proved in aggravation of damages. Thus in an action for breaking and entering the plaintiff's house, the

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[a] Barnum *v.* Vandusen, 16 Conn. 200; and see, upon this subject, Chapter IV, *passim*.

[b] Parsons *v.* Pettingell, 11 All. 507.

[c] Brightman *v.* Bristol, 65 Me. 426.

[d] Stevenson *v.* Wallace, 27 Gratt. 77.

debauching of his daughter and servant, and the consequential damages to the plaintiff, may be laid in aggravation.[a]** So spoliation or asportation of trees may be laid as aggravation in this form of proceeding.[b] So it has been held that a plaintiff can recover in aggravation of damages for the carrying off of personal property, and the damages for the carrying off should be such as would be given in trover.[c] But where trespass was brought for breaking and entering the plaintiff's dwelling-house, and taking and carrying away certain goods and chattels, and converting and disposing of the same to the defendant's use, it not being averred that the chattels belonged to the plaintiff, the judge who tried the cause directed a verdict for the trespass only; and on a motion to increase the damages, this was held right.[d] If a plaintiff in trespass introduces evidence of matters which could be shown in aggravation, he can, of course, only recover in this action provided he first proves an entry.[e]

[a] Starkie on Evidence, *1451; Bennett *v.* Allcott, 2 T. R. 166; Wright *v.* Chandler, 4 Bibb. 422. Sometimes the expression "aggravation of damages" is used where the act is really part of the trespass. So in Keenan *v.* Cavanaugh, 44 Vt. 268, where, through the defendant's failure to keep fences in repair, his cattle strayed into plaintiff's grounds, the court said that the plaintiff could recover for the entry, and that the plaintiff could show "in aggravation" of damages that the calf bit off some limbs of one of the plaintiff's trees, and broke another tree. Wheeler, J.: "The injury done by the calf to the trees was an aggravation of the trespass committed by the entry, and although that injury may not be such as cattle are by nature wont to commit, nor of itself alone a trespass of the defendant, the damage done by it can be recovered with the damage done by the trespass it was a part of."

[b] Anderson *v.* Buckton, 1 Str. 192; Ridgely *v.* Bond, 18 Md. 433.

[c] Warner *v.* Abbey, 112 Mass. 355. It seems that it would be better to treat a claim for such a conversion as a separate cause of action.

[d] Pritchard *v.* Long, 9 M. & W. 666. Where the owner of land had sold the defendant trees which he did not carry off in a reasonable time, but subsequently entered and carried them off, the defendant was held liable for the trespass, but not for the value of the trees, for they had become the property of the defendant. Hoit *v.* Stratton Mills, 54 N. H. 109.

[e] Brown *v.* Lake, 29 Oh. St. 64.

§ 930. **Exemplary damages.**—* The plaintiff is not restrained to the amount of the mere pecuniary loss sustained; he is always at liberty to give in evidence the circumstances which accompany and give character to the trespass. If the act be malicious or oppressive, exemplary damages may therefore be recovered.[1] In Pennsylvania, where a party proceeded in the Common Pleas, under the act of that State, to obtain the right to enter on land of a third party to make a railroad, and after the value of the land of the plaintiff was fixed upon, but before judgment was given, proceeded to enter, it was held that though this did not excuse the trespass, it took away all pretext for vindictive damages.[2] **

Sometimes treble damages in the nature of exemplary damages are given by statute. They are not to be recovered unless the trespass was committed wilfully or maliciously.([a])

Trespass.

§ 931. **Right of action.**—* It is well settled in England, and generally in the United States, that to entitle the plaintiff to bring an action of trespass *quare clausum fregit*, possession, in fact, is indispensable.[3] ([b]) And as

[1] Mitchell *v.* Billingsley, 17 Ala. 391.

[2] Harvey *v.* Thomas, 10 Watts 63.

[3] 3 Wooddeson 193, 194; Bedingfield *v.* Onslow, 3 Lev. 209. The general doctrine that trespass *quare clausum fregit* will not lie by lessor out of possession against a stranger for an injury to real property, is well settled in New York. Campbell *v.* Arnold, 1 Johns. 511; Wickham *v.* Freeman, 12 Johns. 183; unless where the plaintiff shows title to lands not in the actual possession of any one; in which case the possession follows the title. Van Rensselaer *v.* Radcliffe, 10 Wend. 639; Holmes *v.* Seely, 19 Wend. 507; and so in Massachusetts, Lienow *v.* Ritchie, 8 Pick. 235; French *v.* Fuller, 23 Pick. 104. And it is equally well settled in Ohio: Miller *v.* Fulton, 4 Oh. 433. And in Kentucky: Foster *v.* Fletcher, 7 T. B. Mon. 534; Owings *v.* Gib-

([a]) Barnes *v.* Jones, 51 Cal. 303; Reed *v.* Davis, 8 Pick. 514; Michigan L. & I. Co. *v.* Deer Lake Co., 60 Mich. 143; Robinson *v.* Kime, 70 N. Y. 147.

([b]) *Acc.* Smith *v.* Wunderlich, 70 Ill. 426. But see, as to the rules when an actual and when a constructive possession have been interrupted: McWilliams *v.* Morgan, 75 Ill. 473.

against a wrong-doer bare possession is sufficient.[1] And it results from the same rule, that if the trespass amount to an ouster of the plaintiff, he can recover damages only for the trespass itself, or first entry; for though every subsequent wrongful act is a continuance of the trespass, yet to enable the plaintiff to recover damages for these acts there must be a re-entry.[2] **

§ 932. **General rule.**—The general principle upon which compensation for injuries to real property is given, is that the plaintiff should be reimbursed to the extent of the injury to the property. The injury caused by the defendant may be of a permanent nature; in such a case the measure of damages is the diminution in the market value of the property.([a]) If the injury caused a total or partial loss of the land for a limited time, the diminution in rental value is the measure.([b]) One of these two measures is always applicable. If the injury is easily

son, 2 A. K. Marsh. 515; Carrine *v.* Westerfield, 3 A. K. Marsh. 331. In Texas, also, a lessor cannot maintain an action for a trespass committed on the leased premises while in possession of the tenant: the lessee alone can sue. Reynolds *v.* Williams, 1 Tex. 311. In the ordinary case of carrying on a farm at the halves, the owner is not so far divested of the possession, but that he may maintain trespass for injury to the inheritance. Cutting *v.* Cox, 19 Vt. 517. And if the plaintiff have the right of property, and of immediate possession, he may maintain trespass though not in actual possession. Mason *v.* Lewis, 1 Greene (Ia.) 494; Poole *v.* Mitchell, 1 Hill (S.C.) 404. In Connecticut, it has been decided that a plaintiff in trespass, having the sole and exclusive possession, may recover against a wrong-doer the whole damage done by him, though the conveyance from some of those under whom he claims was defective. Curtiss *v.* Hoyt, 19 Conn. 154.

[1] Chambers *v.* Donaldson, 11 East 65; Graham *v.* Peat, 1 East 244; First Parish in Shrewsbury *v.* Smith, 14 Pick. 297; Branch *v.* Doane, 18 Conn. 233.

[2] Holcomb *v.* Rawlyns, Cro. Eliz. 540; Monckton *v.* Pashley, 2 Ld. Raym. 974; s. c. 2 Salk. 638; 3 Bl. Com. 210; Case *v.* Shepherd, 2 Johns. Cas. 27; Holmes *v.* Seely, 19 Wend. 507; Rowland *v.* Rowland, 8 Oh. 40; Shields *v.* Henderson, 1 Litt. (Ky. 239.)

([a]) Hosking *v.* Phillips, 3 Ex. 168; Lukin *v.* Goodsall, Pea. Add. Cas. 15; Studenmire *v.* De Bardelaben, 85 Ala. 85; Karst *v.* St. Paul, S. & T. F. R.R. Co., 22 Minn. 118; Baldwin *v.* Chicago, M. & S. P. Ry. Co., 35 Minn. 354; Honsee *v.* Hammond, 39 Barb. 89; Agate *v.* Lowenbein, 6 Daly 291.

([b]) Baltimore & O. R.R. Co. *v.* Boyd, 67 Md. 32; Howes *v.* Grush, 131 Mass. 207; Whipple *v.* Wanskuck Co., 12 R. I. 321.

reparable, the cost of repairing may be recovered.(a) But it must be shown that the repairs were reasonable; and if the cost of repairing the injury is greater than the diminution in market value of the land, the latter is always the true measure of damages.(b) Strictly speaking, therefore, the cost of repairs is not the measure of damages, but only evidence of the amount of damages.(c) Thus, in a case where the defendant so felled trees on his own land that the brush was cast on the plaintiff's land, the court said: "The expense [of removing the brush] is not the measure of damages. It is a fact to be considered in connection with other evidence, such as the value of the land before and since the cutting, the uses to which it was adapted, and the extent to which the plaintiff had been deprived of the use. The damages may be more and they may be less than the cost of removing the brush."(d)

Both cost of repairs and permanent depreciation cannot be recovered in the same case. So in a recent case in New York, where the defendant injured the plaintiff's house by storing ice so near it that the ice melted and water soaked through, and the jury were instructed to give, first, the rental value to the time of trial, and the cost of putting the plaintiff's premises in condition to be unaf-

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(a) Harrison *v.* Kiser, 79 Ga. 588, 595; Graessle *v.* Carpenter, 70 Ia. 166; Whipple *v.* Wanskuck Co., 12 R. I. 321.

(b) Seely *v.* Alden, 61 Pa. 302.

(c) Holt *v.* Sargent, 15 Gray 97.

(d) Smith, J., in Hutchinson *v.* Parker, 64 N. H. 89, 90. In an action for failure to keep a drain in repair by which land was overflowed, the court said that whether damages should be measured by the rent of the land, the probable value of the crops that might have been grown, or the permanent deterioration of the land, *one or all* was to be determined by the jury on the evidence. Hammond *v.* Port Royal & A. Ry. Co., 15 S. C. 10, 31. This was going too far. The jury should have been given the option between the first and third measures, but no more.

fected by the proximity of ice, and second, the permanent depreciation in value, this was held error.(a) Finch, J., said: "The cost of prevention and the result of continuance cannot both be given. The award of the one must necessarily exclude the other."

The general rules as to remoteness and certainty of proof apply. So a plaintiff whose docks are obstructed cannot show that certain individuals would otherwise have made purchases.(b)

§ 933. **Destruction of trees.**—When by a trespass upon real property trees standing upon the property are destroyed, the value of the trees can be recovered. If the trees are full-grown timber-trees, this is usually all that can be recovered.(c) If they are fruit or ornamental trees, however, the injury goes beyond the mere destruction of the trees; it is an injury to the realty, since the value of that is diminished by more than the value of the trees as timber, because their chief value is for productive or ornamental purposes. The measure of damages when ornamental or fruit-bearing trees or growing timber-trees are cut is therefore the difference in the value of the realty before and after the trespass; (d)

(a) Barrick *v.* Schifferdecker, 123 N. Y. 52.

(b) Garitee *v.* Baltimore, 53 Md. 422.

(c) E. E. Bolles W. W. Co. *v.* U. S., 106 U. S. 432; Striegel *v.* Moore, 55 Ia. 88; Graessle *v.* Carpenter, 70 Ia. 166; Michigan L. & I. Co. *v.* Deer Lake Co., 60 Mich. 143; Miller *v.* Wellman, 75 Mich. 353; Carner *v.* Chicago, S. P. M. & O. Ry. Co., 43 Minn. 375; Ward *v.* Carson R. W. Co., 13 Nev. 44; Foote *v.* Merrill, 54 N. H. 490; Whitbeck *v.* New York C. R.R. Co., 36 Barb. 644; Bennett *v.* Thompson, 13 Ired. 146; Coxe *v.* England, 65 Pa. 212; Ross *v.* Scott, 15 Lea 479; Tilden *v.* Johnson, 52 Vt. 628; Webster *v.* Moe, 35 Wis. 75; Tuttle *v.* Wilson, 52 Wis. 643; Cotter *v.* Plumer, 72 Wis. 476. Except where the statute applies. So where grass was cut and made into hay by the defendant, the value of the standing grass was given: Lewis *v.* Courtwright, 77 Ia. 190.

(d) Chipman *v.* Hibberd, 6 Cal. 162; Wallace *v.* Goodall, 18 N. H. 439; Argotsinger *v.* Vines, 82 N. Y. 308; Van Deusen *v.* Young, 29 Barb. 9. In

and that was therefore the rule adopted where trees were cut in a pasture, where they had been used as a shade and wind-break for cattle.(a) It is sometimes said that the value of the trees (as timber) and the injury to the realty by their destruction may be recovered.(b) This is practically the same rule, and is unobjectionable. It has been said that where trees were cut and made into lumber by the defendant, and sold in a distant market, the measure of damages is the price obtained less the expenses.(c) This, however, is not strictly correct,(d) though in the absence of more definite evidence as to the value of the trees standing, the price obtained might be shown as evidence of such value. Where the trees destroyed were in a nursery, the measure of damages for their destruction was held to be their market value.(e) It is no defense nor matter of mitigation in an action for cutting down the plaintiff's shade-trees, that they made the defendant's house damp and unhealthy.(f)

§ 934. **Value enhanced by defendant's labor.**—In this case, as in others where labor has been expended upon chattels obtained by a trespass on real property, attempts have been made to recover the value of the chattels after the labor has been expended upon them, on the ground that the chattels still remain the plaintiff's property, and he has a right to take them where he finds them, or at his option to recover compensation for the loss of them at that time. It has accordingly been held in many cases

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other words, the plaintiff recovers "the value of the trees in a growing state"; *i. e.*, their value to the land. Montgomery *v.* Locke, 72 Cal. 75.

(a) Nixon *v.* Stillwell, 52 Hun 353.

(b) Longfellow *v.* Quimby, 33 Me. 457.

(c) Winchester *v.* Craig, 33 Mich. 205; Herdic *v.* Young, 55 Pa. 176.

(d) Coxe *v.* England, 65 Pa. 212.

(e) Birket *v.* Williams, 30 Ill. App. 451.

(f) Bliss *v.* Ball, 99 Mass. 597.

that the measure of damages is the value of logs immediately after cutting,(a) or even of timber made from the trees cut.(b) This, however, loses sight of the fact that the action is for a trespass upon real property. Where the trespass was wilful, the defendant having knowingly expended his labor on the plaintiff's property has no legal or equitable claim to the results of his labor; and in such a case it has been held that even in an action for trespass upon the land the value of the chattel in its improved form may be recovered.(c) It would, however, be better not to allow such recovery in an action for trespass upon real estate.

The Supreme Court of New Hampshire, in an action of trespass *quare clausum* for cutting and removing the plaintiff's trees, used this unanswerable argument: "Had the defendant set fire to the plaintiff's trees and destroyed them, the measure of damages would have been their value as they stood on the land; and we cannot say that he justly ought to pay any more for cutting and removing than destroying them, nor that the plaintiff justly ought to receive any more in one case than in the other."(d) And though the court was constrained by the authorities to say that the rule might be different in trover, they allowed in the case at bar a recovery for the value of the trees standing. And the opinion affords strong ground

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(a) Smith *v.* Gonder, 22 Ga. 353; Gardere *v.* Blanton, 35 La. Ann. 811; Firmin *v.* Firmin, 9 Hun 571; Bennett *v.* Thompson, 13 Ired. 146.

(b) Stuart *v.* Phelps, 39 Ia. 14; Corning *v.* Woodin, 46 Mich. 44; Nesbitt *v.* St. Paul L. Co., 21 Minn. 491; Baker *v.* Wheeler, 8 Wend. 505; Rice *v.* Hollenbeck, 19 Barb. 664, often cited on this point, are not cases of trespass on real property, but of conversion of felled timber.

(c) E. E. Bolles W. W. Co. *v.* U. S., 106 U. S. 432; Shepard *v.* Pettit, 30 Minn. 481; Hinman *v.* Heyderstadt, 32 Minn. 250. So in Wisconsin by statute: Haseltine *v.* Mosher, 51 Wis. 443.

(d) Hibbard, J., in Foote *v.* Merrill, 54 N. H. 490, 491.

for supposing that upon the case being again presented the same rule would be adopted in trover.

In Adams *v.* Blodgett ([a]) the defendant stripped bark from the trees of the plaintiff, and the measure of damages was held to be the market value of the *bark* at the place where it grew. This seems to involve a slight error, for the value of the bark severed would include the cost of stripping, and would in the ordinary case exceed by that amount the injury to the realty.

In some cases it is said that the rule is different in trover and in trespass *quare clausum*, an allowance being made for the defendant's labor in the latter form of action, though not in the former.([b]) This question has already been considered.([c])

§ 935. **Removal of minerals.**—Where coal, ore, or other valuable mineral is wrongfully but in good faith mined from the plaintiff's land, the measure of damages is generally and properly held to be the value of the coal or ore taken as it lay in the mine; ([d]) often estimated by taking the value at the mouth of the mine and subtracting the expense of raising it to that point, or if the mineral is there reduced or dressed its value in that state less the expense reasonably incurred.([e]) Some cases hold the

([a]) 47 N. H. 219.

([b]) Omaha & G. S. & R. Co. *v.* Tabor, 13 Col. 41; Skinner *v.* Pinney, 19 Fla. 42; Foote *v.* Merrill, 54 N. H. 490.

([c]) §§ 500 *et seq.*

([d]) Livingstone *v.* Rawyard's C. Co., 5 App. Cas. 25; Jegon *v.* Vivian, L. R. 6 Ch. 742; Hilton *v.* Woods, L. R. 4 Eq. 432; U. S. *v.* Magoon, 3 McLean 171; Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80; Viliski *v.* Minneapolis, 40 Minn. 304; Coleman's Appeal, 62 Pa. 252; Oak Ridge Coal Co. *v.* Rogers, 108 Pa. 147; State *v.* Pacific Guano Co., 22 S. C. 50; Coal Creek M. & M. Co. *v.* Moses, 15 Lea 300.

([e]) *In re* United M. C. Co., L. R. 15 Eq. 46; Wood *v.* Morewood, 3 Q. B. 440; Aurora Hill C. M. Co. *v.* 85 M. Co., 12 Sawy. 355; Maye *v.* Tappan, 23 Cal. 306; Goller *v.* Fett, 30 Cal. 481; Hendricks *v.* Spring Valley M. & I. Co., 58 Cal. 190; Chamberlain *v.* Collinson, 45 Ia. 429;

measure of damages to be the value of the coal or ore directly after it is severed, without allowance for the expense of severing, on the ground that the coal or ore is at that moment converted.([a]) But as the injury is really to the realty, the value of which is diminished by the value of the mineral *in situ*, the rule first stated gives compensation, and is the true rule. If injury is done to the land beyond the value of the mineral extracted, it is of course to be compensated.([b])

§ 936. **Accounts between owners.**—The milder rule has been adopted in adjusting accounts between owners of particular interests in the same property; so in an action by a mortgagee against a mortgagor for injury to the security.([c]) Where, in an action by the landlord against his tenant for digging clay on the demised premises, one count of the plaintiff's complaint was for injury to the reversion, and the other in trover for the value of the clay, and the jury found, that the removal of the clay had diminished the value of the land by £156, and that the value of the clay as dug was £150, and as a verdict was entered for the larger sum, a motion to increase the verdict by adding to it the sum of £150 was denied by the Irish Court of Queen's Bench.([d]) So in an accounting

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Austin *v.* Huntsville C. & M. Co., 72 Mo. 535; Waters *v.* Stevenson, 13 Nev. 157; Dougherty *v.* Chesnutt, 86 Tenn. 1.

([a]) Illinois & S. L. R.R. & C. Co. *v.* Ogle, 82 Ill. 627; Barton Coal Co. *v.* Cox, 39 Md. 1; Franklin C. Co. *v.* McMillan, 49 Md. 549; Blaen Avon C. Co. *v.* McCulloh, 59 Md. 403. So where ice was wrongfully taken, the measure of damages was held in Illinois to be the value of the ice after it was scraped, cut, and ready for market: Washington Ice Co. *v.* Shortall, 101 Ill. 46; Piper *v.* Connelly, 108 Ill. 646. But a better rule is that which gives the plaintiff the value of the ice as it lay on the water, just before cutting. People's Ice Co. *v.* The Excelsior, 44 Mich. 229.

([b]) Barton Coal Co. *v.* Cox, 39 Md. 1; Forsyth *v.* Wells, 41 Pa. 291.

([c]) Whorton *v.* Webster, 56 Wis. 356.

([d]) Templemore *v.* Moore, 15 Ir. C. L. 14.

between tenants in common, the value of ore taken from the land by one tenant is to be estimated according to its value *in place*.[a] In Curtis *v.* Baugh,[b] it was held that a defendant, who had agreed to indemnify the plaintiff against loss by a sale of timber which was on the land, would be liable for what he had obtained for the timber on a sale, *i. e.*, its value as a chattel.

§ 937. **Destruction of crops.**—In the case of the destruction or removal of crops, the plaintiff recovers not the diminution of the market value of the land, but the value of the crops destroyed.[c] In estimating the value of the crop, the prevailing rule seems to be to take its actual value at the time of trespass, not its probable value, assuming that it would have matured.[d] On the other hand, in Smith *v.* Chicago, C. & D. R.R. Co.[e] the measure of damages was stated to be the difference between the market value of the crops when ripe, and their value in an injured state, less the costs of growing them. This rule, however, is objectionable because it assumes without proof that the crops would have come to maturity. In Gulf, C. & S. F. Ry. Co. *v.* McGowan,[f]

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[a] Clowser *v.* Joplin Mining Co., 4 Dill. 469 n.

[b] 79 Ill. 242.

[c] Sabine & E. T. Ry. Co. *v.* Johnson, 65 Tex. 389; Folsom *v.* Apple R. L. D. Co., 41 Wis. 602. *Contra*, Drake *v.* Chicago, R. I. & P. Ry. Co., 63 Ia. 302.

[d] Gresham *v.* Taylor, 51 Ala. 505; King *v.* Fowler, 14 Pick. 238; Hinman *v.* Heyderstadt, 32 Minn. 250; Lommeland *v.* St. Paul, M. & M. Ry. Co., 35 Minn. 412; Byrne *v.* Minneapolis & S. L. Ry. Co., 38 Minn. 212; Richardson *v.* Northrup, 66 Barb. 85; Sabine & E. T. Ry. Co. *v.* Joachimi, 58 Tex. 456; International & G. N. Ry. Co. *v.* Benitos, 59 Tex. 326; Texas & S. L. R.R. Co. *v.* Young, 60 Tex. 201; Gulf, C. & S. F. Ry. *v.* Pool, 70 Tex. 713; Trinity & S. Ry. Co. *v.* Schofield, 72 Tex. 496; Sabine & E. T. Ry. Co. *v.* Smith, 73 Tex. 1.

[e] 38 Ia. 518; *acc.* Throop *v.* Fowler, 15 Up. Can. Q. B. 365.

[f] 73 Tex. 355; *acc.* International & G. N. R.R. Co. *v.* Pape, 73 Tex. 501.

the Supreme Court of Texas said that one way to get at the value of the crops when destroyed was to take the value when ripe less the costs of maturing them, and also allow for the contingencies of loss before maturity. An allowance for the contingencies of loss before maturity would, if not otherwise objectionable, make this rule result in perfect compensation; but any estimate of the kind must be uncertain.

If, however, the destruction is not of an annual crop, but of a more or less permanent one, as of the turf of a pasture or meadow, the injury becomes an injury to the land itself, and the measure of damages is the diminished value of the land,[a] or, if the meadow can be restored at a reasonable expense, the cost of such restoration.[b]

§ 938. **Destruction of fences.**—In estimating the injury to fences, also, the value of the fences, not the diminished value of the land, should be the measure of damages.[c] The value of the fences is measured by the sum which "will, properly expended, restore the premises to their condition before the interference therewith by the defendant."[d]

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[a] Fort Worth & D. C. Ry. Co. *v.* Hogsett, 67 Tex. 685; Fort Worth & N. O. Ry. Co. *v.* Wallace, 74 Tex. 581.

[b] Vermilya *v.* Chicago, M. & S. P. Ry. Co., 66 Ia. 606.

[c] Avary *v.* Searcy, 50 Ala. 54, a case of this sort, was treated by the court as an action of trover, and evidence offered in mitigation that the plaintiff's land was of little value was excluded.

[d] Marvin *v.* Pardee, 64 Barb. 353, 361. In Pennybecker *v.* McDougal, 48 Cal. 160, the plaintiff recovered only the value of the materials after removal, because it was an action of replevin, and not an action complaining of an injury to the inheritance. In Logansport, C. & S. Ry. Co. *v.* Wray, 52 Ind. 578, it was held that the measure of damages for *failure to perform a contract to erect fences* was the cost of constructing them.

§ 939. **Removal of soil.**—* In an action of trespass for entering upon the plaintiff's close, and carrying away the soil, the proper measure of damages has been held by the English Court of Exchequer to be the value of the land removed, and not the expense of restoring the premises to their original condition.(a) ** In an action to recover for injuries to the plaintiff's land, occasioned by its falling in, in consequence of excavations made by the defendant in his own land adjoining, the measure of damages is not what it will cost to restore the lot to its former condition, or to build a wall to support it, but the amount by which the lot is diminished in value by reason of the acts of the defendant.(b) In an action of trespass for digging a ditch on the plaintiff's land, the measure of damages is the cost of restoring the land to its former condition, with compensation for loss of the use of it, if this altogether is less than the diminution in value of the land with the ditch open.(c) This is on the principle already stated, that if the cost of repairing the injury is greater than the diminution in market value of the latter, the latter is always the true measure of damages, the rule of avoidable consequences requiring that in such a case the plaintiff shall diminish the loss as far as possible.

(a) Jones *v.* Gooday, 8 M. & W. 146; *acc.* De Costa *v.* Massachusetts F. W. & M. Co., 17 Cal. 613; Mueller *v.* St. Louis & I. M. R.R. Co., 31 Mo. 262.

(b) Moellering *v.* Evans, 121 Ind. 195; Gilmore *v.* Driscoll, 122 Mass. 199; Kopp *v.* Northern P. R.R. Co., 41 Minn. 310; McGuire *v.* Grant, 25 N. J. L. 356; Keating *v.* Cincinnati, 38 Oh. St. 141. In Gilmore *v.* Driscoll, it was held that the defendant was not liable for injuries to the buildings or improvements thereon; that he was liable for damages occasioned by the loss and injury to the soil alone; that he was not liable for the cost of putting the plaintiff's land into and maintaining it in its former condition, and that the plaintiff could not recover the diminished market value of the land, for the diminution in market value was not shown to be due entirely to loss of land.

(c) Walters *v.* Chamberlin, 65 Mich. 333.

§ 940. **Mills and flowage.**—* We have already seen that where the injury consists in improperly flooding the land of another, the law presumes nominal damages, even if no actual damage be proved; ([a]) and so if water be wrongfully diverted from a mill, or a watercourse be obstructed, nominal damages will, at all events, be awarded.[1] ([b]) So it is not necessary for the plaintiff, in an action for the diversion of a watercourse, to show that he has sustained specific damage thereby; he may recover, notwithstanding he has sustained no actual or perceptible injury.[2]

In Massachusetts, where an action was brought for an injury to the plaintiff's mill, by causing the water to flow back on it, the judge instructed the jury, that, if the plaintiff proved his mill to have sustained any actual perceptible damage in consequence of the defendant's act, he was entitled to recover, but that for a theoretic injury or damage to be inferred from the obstruction of the water by the defendant's dam, he was not answerable; and on motion for a new trial this was held right.[3] ([c])

[1] Butman *v.* Hussey, 12 Me. 407; Parker *v.* Griswold, 17 Conn. 288; Branch *v.* Doane, 18 Conn. 233.

[2] Parker *v.* Griswold, 17 Conn. 288; Bower *v.* Hill, 1 Bing. N. C. 549.

[3] Thompson *v.* Crocker, 9 Pick. 59. See an action for flooding lands in Pennsylvania: Bell *v.* McClintock, 9 Watts 119.

([a]) Munroe *v.* Stickney, 48 Me. 462; Miller *v.* Laubach, 47 Pa. 154. In this class of cases, the jury, without reference to the person of the owner, or the state of his business, are to value the injury at the time when it was completed. The measure of damages is the difference between what the property would have sold for as affected and as unaffected by the injury. Schuylkill Nav. Co. *v.* Farr, 4 W. & S. 362.

([b]) *Acc.* Jones *v.* Hannovan, 55 Mo. 462; Tootle *v.* Clifton, 22 Oh. St. 247. See further, Chatfield *v.* Wilson, 27 Vt. 670. It is no answer to this action that the defendant first appropriated the water to his own use. Mason *v.* Hill, 3 B. & A. 304.

([c]) *Acc.* Elliott *v.* Fitchburg R.R. Co., 10 Cush. 191; see also Burden *v.* Mobile, 21 Ala. 309; McElroy *v.* Goble, 6 Oh. St. 187. The damage from the stoppage of the plaintiff's mill is an injurious consequence which he may re-

The principle of the common law in cases of this kind, as we have seen, is that successive actions can be brought as long as the obstruction exists; and in some of the States of the Union an attempt has therefore been made to regulate the subject by statute. So, in North Carolina, an act was passed, of which the leading feature is to prevent any action being brought against the owner of a mill, unless it be first ascertained on petition, by the verdict of a jury, that the annual damage during the time for which the action is to be brought, amounts to the sum of twenty dollars at least.[1] Where two or more mills are entitled to a common use of water, the owner of the upper mill must afford the lower mill a fair and reasonable participation in its use. If the injury is trivial the law will not afford redress, but it will interpose to prevent the lower mill being rendered useless or unproductive.[2] **

* In a case in the Queen's Bench, where in an action of trespass for entering the plaintiff's close and destroying a mill-dam, the defendant justified the trespass on the ground that he was possessed of a mill, and that a stream of water of right flowed thereto; and that the plaintiff's dam obstructed the flow of water to defendant's mill, it was asked whether the plaintiff sought to recover substantial damages; and his counsel not declaring such to be the case, the Lord Chief-Justice said that the action was brought more to try a right than to recover damages, and directed the defendant to begin; and on motion for a new trial this was held right.[3] **

[1] Gilliam *v.* Canaday, 11 Ired. 106.
[2] Sackrider *v.* Beers, 10 Johns. 241.
[3] Chapman *v.* Rawson, 8 Q. B. 673.

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cover in an action of trespass for the destruction of his mill-dam without specially averring it in the declaration. Spigelmoyer *v.* Walter, 3 W. & S. 540.

§ 941. Diversion or obstruction of water—Avoidable consequences.—In this instance, the injury may or may not be permanent; moreover, it may or may not be easily remediable, and the measure of damages will vary accordingly. The value of the use of the water during the time the plaintiff was wrongfully deprived of it will usually be the true measure of damages.(a) Thus, in an early New York case, the damages were arrived at by a comparison of the tolls upon the number of barrels of flour actually ground by the plaintiff's mill, with the number that he might have ground if he had had the use of the water to which he was entitled.[1] In a less direct way, the loss may be determined by the decrease in the annual value of the property during the continuance of the injury.(b) But where the injury is of a permanent character, the damages should be assessed on that basis. So it has been held that the measure of damages sustained by a riparian owner, by the unlawful filling of a pond, is the depreciation in the value of the property occasioned thereby, not merely the depreciated value of its use whenever used.(c) The market value of the property affected of course becomes the measure of damages.(d)

In either case the question of the cost of obviating the loss may arise. For example, in an action for injury to

[1] Merritt *v.* Brinckerhoff, 17 Johns. 306. See, also, Platt *v.* Root, 15 Johns. 213.

(a) Pollitt *v.* Long, 58 Barb. 20.

(b) Honsee *v.* Hammond, 39 Barb. 89. Where the defendants cut off the water which worked the plaintiff's mill, the plaintiff was allowed to recover profits he would otherwise have made, which would be the market value less the value of raw material and of labor, or if he engaged his labor by the year, he should deduct the value of the raw material only. Holden *v.* Lake Co., 53 N. H. 552.

(c) Finley *v.* Hershey, 41 Ia. 389.

(d) It has been held in Pennsylvania that the general market value for any purpose should be taken, and not merely the market value for the specific uses (farming, mining, etc.) to which the plaintiff may be putting the property. Shenango & Alleghany R.R. Co. *v.* Braham, 79 Pa. 447, and cases cited.

a mill-pond by throwing refuse into the stream above. It may be that the cost of removing the deposit would be less than the difference in the value of the land occasioned by it, and the cost of removal would then be the proper measure; or it may be that the cost of removal would be much greater than the injury by the deposit, and the true measure would then be the difference in value; and it will frequently be impossible, until evidence is put in, to determine which rule is applicable.[a] Whenever it appears that to obviate the injury by removal or repairs in the proper course, the plaintiff is allowed whatever sum is reasonably necessary for the purpose, even though this exceed the original cost of the part repaired.[b] So where the defendant wrongfully cut a pipe used to convey water to the plaintiff's land, the measure of damages is the cost of reconstructing the pipe line and the value of the use of the water while the plaintiff was deprived of it.[c] Where the defendant threw flax shives into the stream below the plaintiff's grist-mill, and the shives settled in the plaintiff's pond, forming a bar which caused an obstruction and filled the dam belonging to the mill, it was held that the plaintiff, without having removed the deposit, could recover as damages the amount necessary to restore the mill-pond to the condition it was in before the damage occurred.[d]

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[a] Agnew, J., Seely *v.* Alden, 61 Pa. 302. So where the defendant had merely connected the stream with a pipe of his, the court refused prospective damage, saying that a severance of the connection would cause the water to flow in its accustomed channel, and that there was no permanent injury, for there was no severance of any part of the plaintiff's freehold, nor was there any depositing of a permanent nuisance on the land. Bare *v.* Hoffman, 79 Pa. 71.

[b] De Costa *v.* Massachusetts F. W. & M. Co., 17 Cal. 613; Topsham *v.* Lisbon, 65 Me. 449.

[c] Reynolds *v.* Braithwaite, 131 Pa. 416.

[d] O'Riley *v.* McChesney, 3 Lans. 278; s. c. 49 N. Y. 672.

§ 942. **Flooding land.**—In this instance, also, so far as the injury is partial or temporary only, the measure of damages is the actual loss sustained during the continuance of the injury,[a] measured in the ordinary case by the rental value of the land.[b]

If the injury is permanent, the diminished market value of the property (comparing the value before and immediately after the completion of the wrongful act) must be taken,[c] not the loss of profits, custom, etc., though these may serve as the basis of a witness' opinion as to the general market value. But if the flowing water separates one part of the complainant's land from another, so as to render bridges or new causeways necessary, it is a direct injury for which damages are to be awarded, and the cost of a new structure would, in some cases, be a proper measure of the injury. Where the value of the land so separated is not enough to justify the outlay, the damages under this rule must be limited to the loss of productive value.[d] If the injury consists in a permanent liability to successive losses, then their amount must be estimated.[e] If the injury consists in a past loss for a definite period, together with a partial permanent dim-

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[a] Pinney *v.* Berry, 61 Mo. 359. In a proper case this will be the amount of profits lost. Simmons *v.* Brown, 5 R. I. 299: see § 184. So in an action for overflowing his land by the defendant's mill-dam, the plaintiff is not confined to the net gain to be derived from the land in its actual condition. The jury should consider the capabilities of the land for more profitable use in a changed condition. Ellington *v.* Bennett, 59 Ga. 286.

[b] Georgia R.R. & B. Co. *v.* Berry, 78 Ga. 744; Sullens *v.* Chicago, R. I. & P. Ry. Co., 74 Ia. 659; Gulf, C. & S. F. Ry. Co. *v.* Helsley, 62 Tex. 593; Willey *v.* Hunter, 57 Vt. 479.

[c] Schuylkill Nav. Co. *v.* Farr, 4 W. & S. 362: unless, as usual, the injury can be repaired by the expenditure of a reasonable amount of money; in which case that amount may be recovered. Chicago, R. I. & P. R.R. Co. *v.* Carey, 90 Ill. 514.

[d] Bates *v.* Ray, 102 Mass. 458.

[e] Van Pelt *v.* Davenport, 42 Ia. 308.

inution in value, then both must be covered by the damages.(a) Where it was shown that the land would have been flooded by natural causes, but the defendant's act increased the loss, the measure of damages was the increase of loss.(b)

On the same principle, followed where compensation is sought for the destruction of crops, it is held in an action for overflowing land, whereby it could not be planted, that the measure of damages is the rental value, not the probable value of crops, less cost of cultivation.(c) The plaintiff's right to a recovery is not affected by the fact that another dam besides defendant's contributes to the flowage.(d)

§ 943. **Removal of chattels.**—Where a trespasser comes upon land and does no damage except in carrying away property of the owner, the value of such property is the measure of damages.(e) So where a landlord illegally entered the tenant's premises to distrain for rent, and took away property of the tenant, the value of the goods taken may be recovered in an action of trespass *q. c. f.*;(f) or if the goods are sold and applied on the rent, the value less the amount so applied.(g) If the plaintiff paid a judgment obtained in the illegal distress proceedings in order to get back his goods, the judgment and costs so paid may be recovered.(h)

(a) South Bend *v.* Paxon, 67 Ind. 228; Walrath *v.* Redfield, 11 Barb. 368; 18 N. Y 457.

(b) Workman *v.* Great N. R.R. Co., 32 L. J. Q. B. 279; St. Louis, I. M. & S. Ry. Co. *v.* Morris, 35 Ark. 622; Stewart *v.* Schneider, 22 Neb. 286.

(c) Chicago *v.* Huenerbein, 85 Ill. 594 (distinguishing Chicago & R. I. R.R. Co. *v.* Ward, 16 Ill. 522, and apparently overruling it, also saying that the rule laid down in it has not been followed in subsequent cases).

(d) Jones *v.* United States, 48 Wis. 385.

(e) Barker *v.* Bates, 13 Pick. 255.

(f) Cate *v.* Schaum, 51 Md. 299.

(g) Cahill *v.* Lee, 55 Md. 319.

(h) Presstman *v.* Silljacks, 52 Md. 647.

§ 944. **Other injuries to real property.**—In an action for maliciously ousting the plaintiffs of their possession of a mine which they held under a lease, it was held proper to instruct the jury that the measure of damages was what the use of the premises was reasonably worth under the lease during the time the plaintiffs were wrongfully kept out of possession, and also the permanent damage to the leasehold interest, if any, by reason of the mine caving in or getting out of repair, if this resulted from the failure of the defendant to use ordinary care during the time he held possession.[a] In measuring the damages to premises by an interruption of the easement of light, a jury should not estimate the amount on the assumption that they will continue always to be used for the same purpose for which they are used at the time of the injury. The jury can take into consideration the character of the neighborhood, the use to which the plaintiff's buildings were then applied, and also the use to which they might be applied. Mellor, J., said: "In estimating the damages you ought not, in my opinion, to stereotype the existing condition of the premises, but to calculate the reasonable probabilities of a different application of them." [b] If the building can be so altered at reasonable expense as to get as good a light as before the obstruction, the cost of such alterations is the measure of damages.[c] For removal of fixtures the measure of damages is the value of the fixtures as part of the realty, before removal, not their market value after severance.[d] Where the defendant's wall fell and injured the plaintiff's mill, it was held that the rent recovered

[a] Moffatt *v.* Fisher, 47 Ia. 473.

[b] Moore *v.* Hall, 3 Q. B. D. 178, 181.

[c] Ring *v.* Pugsley, 2 P. & B. (N. B.) 303.

[d] Thompson *v.* Pettitt, 10 Q. B. 101; Rhoda *v.* Alameda County, 58 Cal. 357.

should be for such time only as was necessary to repair the premises.(a) This is an obvious deduction from the rule of avoidable consequences. Where the plaintiff's house is destroyed by the defendant, the measure of damages is the cost of replacing it, and the loss of use of the property during rebuilding; (b) but this is subject no doubt to the general rule that the cost of replacing must be less than the diminution in value. Where the house is forcibly detained from the plaintiff, the measure of damages is the value to him of its use.(c) The defendant removed from the plaintiff's land a plank sidewalk belonging to the plaintiff. The measure of damages was held to be the diminished value of the land, not exceeding the value of the sidewalk.(d)

§ 945. **Distraint of cattle damage feasant.**—* It would be improper, while speaking of trespasses to real property, to omit mention of the right given by the English law to distrain beasts doing damage, or in the old Norman French, "damage feasant." The right is strictly limited to the time when the beasts are actually committing the trespass: "The beasts must be damage-feasant at the time of the distress; and if they were damage-feasant yesterday, and again to-day, they can only be distrained for the damage they are doing when they are distrained. And if many cattle are doing damage, a man cannot take one of them as a distress for the whole damage; but he may distrain one of them for its own damage, and bring an action of trespass for the damage done by the rest."[1] **

[1] Hoskins *v.* Robins, 2 Saund. 324, Clement *v.* Milner, 3 Esp. 95; Wormer 327; Vaspor *v.* Edwards, 12 Mod. 658; *v.* Biggs, 2 C. & K. 31.

(a) Ludlow *v.* Yonkers, 43 Barb. 493.
(b) Marks *v.* Culmer, 24 Pac. Rep. 528 (Utah).
(c) Tracy *v.* Butters, 40 Mich. 406.
(d) Rogers *v.* Randall, 29 Mich. 41.

Nuisance.

§ 946. **Special damage necessary.**—* We next come to the subject of nuisances. A great deal of learning will be found in the books as to the precise nature of a nuisance, and as to what can be so considered and treated. That examination would, however, fall beyond the limits of this treatise. "Whatsoever," says Blackstone,[1] "unlawfully annoys or doth damage to another, is a nuisance"; and the remedies for private nuisances he declares[2] to be: an action on the case for damages, in which damages only are recoverable; and an assize of nuisance, by which not only are damages recovered, but the nuisance is itself abated.[3]

The ancient real action which abated the nuisance is, as will be readily seen, one peculiar in its character; but the action on the case, which simply gives damages for the infringement of the plaintiff's right, falls strictly within the class which we are now considering, of disturbances of the enjoyment of real estate (otherwise vindicated in the ordinary actions of trespass or case),[4] and the measure of compensation is to be regulated by the same general principles.

We have already seen,(a) that if the nuisance is so gen-

[1] 3 Bl. Com. 5.

[2] 3 Bl. Com. 220.

[3] This latter remedy has been in New York retained and simplified (4 Kent 70, note) by the provisions of the Revised Statutes (2 R. S. 256) which prescribe the form of the writ, directing the jury that inquires of the nuisance, if they find for the plaintiff to assess the damages; and which also declare that the judgment, in case the plaintiff prevails, shall be as heretofore accustomed, that the nuisance be removed, and that the plaintiff recover the damages occasioned thereby. [Still further simplified, Co. Civ. Proc., §§ 1660–1663.]

[4] To bring an assize of nuisance, it was necessary that the plaintiff should show a freehold estate in the premises; but in the action on the case it is only necessary to prove that he is in possession. Cornes *v.* Harris, 1 N. Y. 223. The remedy by assize of nuisance has long been obsolete in England, and there is said to have been but one such writ prosecuted in New York. Kintz *v.* McNeal, 1 Denio 436.

(a) §§ 34 and 35.

eral as to be a common or public nuisance, the remedy is by indictment, not by private suit. But every individual who suffers actual damage from a common nuisance may maintain an action for his own particular injury, though there may be others equally damnified. It is essential, however, to allege and prove special damage.(a) So it was very early held in England. Thus, in an action for stopping up a highway: "All the court agreed that when an action arises from a public nuisance, there must be a special damage; for he that did the nuisance is punishable at the suit of the public, and to allow all private persons their actions, without special damage, would create an infinite and endless multiplicity of suits." [1]

So, too, in this country: "If a person," said the learned Chancellor Walworth,[2] "sustains no damage (by the erection of a nuisance) but that which the law presumes every citizen to sustain, because it is a common nuisance, no action will lie; but every individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation." [3] (b) It has been questioned whether the injury from a nuisance, to authorize a private suit, must be direct, or whether a consequential injury would

[1] Iveson *v.* Moore, 1 Salk. 15.

[2] Lansing *v.* Smith, 4 Wend. 9, 25. See also, to s. p. Lansing *v.* Wiswall, 5 Denio 213; Dougherty *v.* Bunting, 1 Sandf. 1; and see also First Baptist Church *v.* Sch'y & T. R.R. Co., 5 Barb. 79; Irwin *v.* Dixion, 9 How. 10. See the subject considered in Dobson *v.* Blackmore, 9 Q. B. 991, where it is held that the obstruction of a public navigable river is not a damage to a *reversioner out of possession* of premises abutting thereon. So in regard to mandamus, if a nuisance is not more injurious to the relators than to the inhabitants at large, the remedy is only by indictment. Councils of Reading *v.* Commonwealth, 11 Pa. 196.

[3] People *v.* Corporation of Albany, 11 Wend. 539, to same point; Allen *v.* Ormond, 8 East 4; and Story *v.* Hammond, 4 Ohio 376; Simpson *v.* Seavey, 8 Me. 138; City of Georgetown *v.* Alexandria Canal Co., 12 Peters 91. In South Carolina, see Carey *v.* Brooks, 1 Hill (S. C.) 365.

(a) Winterbottom *v.* Derby, L. R. 2 Ex. 316.

(b) Smith *v.* Lockwood, 13 Barb. 209, *acc.*

suffice; but it seems now settled that it is sufficient if *peculiar* or *special* damage result therefrom, though it be consequential and not direct. So where, in consequence of the defendant's mooring a barge across a canal, the plaintiffs were obliged to carry their goods overland.[1] But a claim for damages against a turnpike company, arising from the plaintiff's *not attempting* at certain times to travel a public highway because of its general badness, is hypothetical, and does not constitute such peculiar damage as to give a private action for a public nuisance.[2] Where the grievance complained of consisted in the erection by the defendant of a dam in a public navigable creek, by means of which the plaintiff was prevented from passing along such creek from his residence above to the land below, and the converse, it was held that such obstruction was not the subject of a private action.[3] **

§ 947. **General rule.**—If a nuisance results in a permanent injury to the realty,(a) the measure of damages is the diminution in market value of the land.(b) If the injury is not permanent, the plaintiff may recover the various items of his loss, but not the diminished value of the land.(c) Here as elsewhere, where the plaintiff has

[1] Rose *v.* Miles, 4 M. & S. 101.
[2] Baxter *v.* Winooski Turnpike Co., 22 Vt. 114.
[3] Seeley *v.* Bishop, 19 Conn. 128.

(a) For the distinction between a permanent and a temporary injury, see §§ 91–95.

(b) Denver & R. G. Ry. Co. *v.* Bourne, 11 Col. 59; Chicago & I. R.R. Co. *v.* Baker, 73 Ill. 316; South Bend *v.* Paxon, 67 Ind. 228; Finley *v.* Hershey, 41 Ia. 389; Cadle *v.* Muscatine W. R.R. Co., 44 Ia. 11; O'Connor *v.* St. Louis, K. C. & N. Ry. Co., 56 Ia. 735; Drake *v.* Chicago, R. I. & P. Ry. Co., 63 Ia. 302; Central B. U. P. R.R. Co. *v.* Andrews, 41 Kas. 370; Givens *v.* Van Studdiford, 86 Mo. 149; McKnight *v.* Ratcliff, 44 Pa. 156; Hanover W. Co. *v.* Ashland I. Co., 84 Pa. 279; Vanderslice *v.* Philadelphia, 103 Pa. 102.

(c) Savannah & O. C. Co. *v.* Bourquin, 51 Ga. 378; Cumberland & O. C. Co. *v.* Hitchings, 65 Me. 140; Hartz *v.* St. Paul & S. C. R.R. Co., 21 Minn. 358; Gulf, C. & S. F. Ry. Co. *v.* Helsley, 62 Tex. 593.

it in his power to put an end to the wrong, he cannot claim compensation for a permanent injury. In Hatfield *v.* Central R.R. Co.,(a) where the defendant wrongfully put down its track on the plaintiff's land, and the plaintiff could have had it removed at any time, it was held immaterial to show the decreased value of the land, for that could be avoided by removing the track, and the plaintiff was confined to the loss he had so far sustained.

§ 948. **Removable nuisance—Elements of loss.**—1. *Loss of rent.* Compensation is recoverable for the loss of use of premises, measured usually by the rental value.(b)

2. *Loss of custom or profits.* In an action for damages for obstructions which hindered the plaintiff in his business, as the keeper of a refectory and lodging-house, and diminished his custom, loss of custom and of profits were held to be the measure of damages; damages were computed by comparing the actual receipts of the plaintiff's hotel for a sufficient period previous to the obstructions, the actual receipts during the continuance

(a) 33 N. J. L. 251. The same point was decided in Hopkins *v.* Western P. R.R. Co., 50 Cal. 190. The court here laid stress on the fact that the nuisance could be abated under the California Practice Act. In Cumberland and Oxford C. Co. *v.* Hitchings, 65 Me. 140, an action for filling up the plaintiff's canal in the construction of a street, it was held error to instruct the jury that the diminution of the value of the property was an element of damage, the court saying that the plaintiff could only recover for damage to the date of the writ, and for injury thereafter he had a fresh action, this being the rule in all actions where something has been lawfully placed on the land of another, which can and ought to be removed. To the same effect see Savannah & Ogeechee Canal Co. *v.* Bourquin, 51 Ga. 378.

(b) Jackson *v.* Kiel, 13 Col. 378; Chicago *v.* Huenerbein, 85 Ill. 594; South Bend *v.* Paxon, 67 Ind. 228; Park *v.* Chicago & S. W. Ry. Co., 43 Ia. 636; Loughran *v.* Des Moines, 72 Ia. 382; Randolf *v.* Bloomfield, 77 Ia. 50; Carli *v.* Union D. S. R. & T. Co., 32 Minn. 101; Givens *v.* Van Studdiford, 86 Mo. 149; Francis *v.* Schoellkopf, 53 N. Y. 152; Jutte *v.* Hughes, 67 N. Y. 267; Schwab *v.* Cleveland, 28 Hun 458; Michel *v.* Monroe Co., 39 Hun 47; McKeon *v.* See, 4 Rob. 449; Besso *v.* Southworth, 71 Tex. 765; Comminge *v.* Stevenson, 76 Tex. 642.

of the obstructions, and the receipts after they were removed.(a)

3. *Unwholesome and offensive results.* In an action for negligently obstructing a drain, which caused water and filth to flow back into the plaintiff's cellar, the plaintiff could, it was said, recover for any injury which diminished the value of his use and occupation of the house, either by reason of the inconvenience and annoyance of the flowing of the cellar, or of unwholesome or disagreeable smells, or of insects thereby generated or attracted to the house.(b) Where, by a defendant's acts, the carcass of a horse was left near the plaintiff's house, he was allowed to recover damages for illness of his family.(c) And so generally if a nuisance causes illness, the actual expenses incurred by reason of the illness may be recovered.(d)

4. *Annoyance and inconvenience.* In an action by the owner of land bordering on a public street against a railway company for building their railway, without right, along such street, the measure of his damages is the loss and inconvenience he has sustained, in view of the use to which his land has been put during the continuance of the nuisance.(e) So in case of a nuisance to the plaintiff's home, he is not restricted to the diminution in rental value, but may recover compensation for deprivation of the comforts of home.(f)

(a) St. John *v.* New York, 13 How. Pr. 527; 6 Duer 315. *Acc.* Park *v.* Chicago & S. W. Ry. Co., 43 Ia. 636. For a case in which it was held improper to estimate the probable loss of purchasers of building lots, see Jacksonville *v.* Lambert, 62 Ill. 519.

(b) Emery *v.* Lowell, 109 Mass. 197; *accord.* Jutte *v.* Hughes, 67 N. Y. 267.

(c) Ellis *v.* Kansas City, S. J. & C. B. R.R. Co., 63 Mo. 131.

(d) Loughran *v.* Des Moines, 72 Ia. 382; Pierce *v.* Wagner, 29 Minn. 355.

(e) Hatfield *v.* Central R.R. Co., 33 N. J. L. 251; Ohio & W. V. Ry. Co. *v.* Gardner, 45 Oh. St. 309.

(f) Randolf *v.* Bloomfield, 77 Ia. 50. See § 42.

5. *Expenses of abating the nuisance.* A plaintiff may recover his reasonable expenses in preventing or removing the nuisance, and the expenses of changes and repairs rendered necessary, so far as they are required by reasonable care and diligence.([a])

6. *Miscellaneous injuries.* Consequential injuries to property to which a private alley was not appurtenant, were held inadmissible in evidence in an action for a nuisance destroying the use of the alley.[1] In Plummer *v.* Pen. Lumber Ass'n,([b]) the defendant put a boom across a stream which prevented the plaintiff's logs from floating down till it was opened. When it was opened they were carried a great distance, and many of them were lost. It was held that the plaintiff could recover for depreciation in the market value of the logs while they were detained, for loss of the logs carried away, and for the expense of searching for the others.

§ 949. **Liability and right of recovery.**—* It has been questioned how far the defendant is liable after he has parted with the possession of or the title to the premises. As a general rule, the erector of the nuisance is answerable for the continuance of it, not only where he has demised the property with a nuisance on it, reserving rent, but where the erection was made on the land of another,

[1] Commrs. of Kensington *v.* Wood, 10 Pa. St. 93.

([a]) Plummer *v.* Penobscot L. A., 67 Me. 363; Emery *v.* Lowell, 109 Mass. 197; Jutte *v.* Hughes, 67 N. Y. 267. Where a nuisance upon the plaintiff's land was occasioned by the discharge of impure water from the defendant's brewery into the plaintiff's clay pits, through a drain which the defendant dug from his premises to those of the plaintiff, it appeared that the water had become so stagnant and offensive as to be complained of as a nuisance, and that the Boston Board of Health had ordered one of the clay pits to be filled up by the plaintiff; and it was held that the expense of filling up the pit should be included in the assessment of damages. Shaw *v.* Cummiskey, 7 Pick. 76.

([b]) 67 Me. 363.

and though he has no right to enter for the purpose of removing it.[1] On this point it has been held in New York, that where the defendant has conveyed the lands on which the nuisance had been placed by him, and surrendered the possession to his grantee, before the time when the plaintiff acquired title, or possession of the lands which were subsequently injured, and without any covenant of warranty, or agreement to uphold the grantee in the occupancy of the premises, no action will lie against such former owner and erector of the nuisance. But though the defendant is out of possession at the time the injury was committed, and another person has the entire possession, still, if the defendant was the erector of the nuisance, and owner of the premises, and under any agreement to uphold the occupant in possession, or if he have conveyed the premises with warranty, —the action will lie against him on the ground that, by such relation with the occupant, he has affirmed the continuance of the nuisance, and that it may be said to be a continuance by himself; and in such case he is liable, of course, for damages, subsequent to the conveyance and down to the commencement of the suit.[2] ** A subsequent purchaser of premises injured by a nuisance erected previous to his purchase, has a remedy for the injury occasioned by the continuance of the nuisance.[3]

[1] Rosewell *v.* Prior, 12 Mod. 635; 1 Lord Raym. 713; and 2 Salk. 460, s. c.; Thompson *v.* Gibson, 7 M. & W. 456; Holmes *v.* Wilson, 10 A. & E. 503; Staple *v.* Spring, 10 Mass. 72; Fish *v.* Dodge, 4 Denio 311. But, though there is a legal obligation to discontinue a trespass or remove a nuisance, no such obligation lies on a trespasser to replace what he had pulled down or destroyed upon the land of another, though he is liable in trespass to compensate in damages for the loss sustained. Therefore, where the owner of a coal mine excavated as far as the boundary, and continued the excavation wrongfully into the neighboring mine, leaving an aperture in the coal of that mine, through which water passed and did damage, held that, though the party excavating was liable in trespass for breaking into the neighboring mine, he was not liable in case for omitting to close up the aperture on his neighbor's soil, though continuing damage resulted. Clegg *v.* Dearden, 12 Q. B. 576.

[2] Blunt *v.* Aikin, 15 Wend. 522; Waggoner *v.* Jermaine, 3 Denio 306; Staple *v.* Spring, 10 Mass. 72; Angell on Watercourses, § 402 and cases there cited.

[3] Brady *v.* Weeks, 3 Barb. 157.

Waste.

§ 950. **Action of waste.**—* "Waste, *vastum*," says Mr. Justice Blackstone,[1] "is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail." The punishment for waste was by common law and by the statute of Marlbridge[2] single damages only; but by the statute of Gloucester[3] it was provided that the tenants therein mentioned should forfeit the place wasted, and treble damages to him that had the inheritance.

At common law the action of waste lay against tenants in dower and guardians; and the better opinion seems to be that it also lay against a tenant by the courtesy;[4] but by the statute of Marlbridge and the statute of Gloucester, above referred to, it was given against every person holding a lease for life or lives, or for years; and by the latter act, the damages which before were single, were in the cases specified in that statute trebled.[5] Damages were not, however, recoverable for waste committed pending the suit; and these were given in an action of estrepement.[6] **

[1] 2 Com. 281. See, also, the common law with regard to waste very learnedly expounded by Lord Chief Justice Eyre, in Jefferson *v.* Bishop of Durham, 1 B. & P. 105, 120; Story's Equity Juris. § 909. Waste is well known by the name of *degradations* in the French Law, and it will be found treated of in the Civil Code under the proper head. This subject might, perhaps, be classed among actions for the recovery of real estate; but as the proceeding does not always result in a change of the property, it is more properly classified among suits brought for interferences with its enjoyment.

[2] 52 Hen. III, ch. xxiii.

[3] 6 Edw. I, ch. v.

[4] Sayer on Damages, ch. vii, 29; 2 Inst. 145, 299, 300, 305; 2 Bl. Com. 282.

[5] *Statutum de Malberge.* Statutes made at Marlbridge, 52 Hen. III, A.D. 1267, ch. xxiii. "Also, Fermors, during their terms shall not make waste, etc., etc., ... which thing if they do, and thereof be convicted, they shall yield *full damage*, and shall be punished by amerciament grievously."

Statuta Gloucestr'. Statutes made at Gloucester, 6 Edw. I, A.D. 1278. "It is provided, also, that a man from henceforth shall have a writ of waste, etc., against him that holdeth, by the law of England or otherwise, for term of life or for term of years, or a woman in dower. And he which shall be attainted of waste, shall leese (*perde*) the thing that he hath wasted, *and moreover shall recompense thrice so much as the waste shall be taxed at.*"

[6] Sayer on Damages, ch. vii, 34. "It is common learning," said Heath, J.,

* In the action of waste it was originally necessary, in order to entitle the plaintiff to judgment, that the damages found should be something more than nominal; and the sum of three shillings and fourpence appears to have been arbitrarily fixed on as the minimum of damage which would authorize a party to bring such action.[1] This doctrine has been in England extended to the action on the case for injury to the reversion, though not in reason applicable.[2] The commutation was originally introduced on the ground that in the action of waste the place wasted was forfeited, and it was thought not just that the tenant should forfeit his estate for every trifling act of waste; but in actions for injuries to the reversionary interest, the injury complained of may be merely that the act in question will perhaps be afterwards relied on as evidence of the tenant's absolute property in the tenement; here the object of the action is simply to assert the reversioner's right of property, and not to recover damages.[3] **

in Attersoll *v.* Stevens, 1 Taunt. 183, 198, "that every lessee of land, whether for life or years, is liable in an action of waste to his lessor for all waste done on the land in lease, by whomsoever it may be committed." And this has been recognized in New York, in Cook *v.* Champlain T. Co., 1 Denio 91.

[1] Harrow School *v.* Alderton, 2 B. & P. 86.

[2] Rigg *v.* Parsons, cited 2 East 156.

[3] Pindar *v.* Wadsworth, 2 East 154; Redfern *v.* Smith, 1 Bing. 382; 2 Bing. 262; Gibbons on the Law of Dilapidation and Nuisances, 78.

The following is the report of a case decided by the Hon. E. Fitch Smith, First Judge of the Ontario Common Pleas: Nottingham *v.* Osgood.

I. In an action on the case in nature of waste, where the court on the trial instructed the jury on the subject of damages, to "inquire whether, by reason of the additions and alterations made by the defendant, the premises were rendered less or more valuable; if less valuable by reason thereof, then the plaintiff would be entitled to recover the actual damage he had sustained, to be ascertained by the jury from all evidence in the cause; but if, from the evidence, the jury should be satisfied that the premises, by reason of such alterations and erections, were in point of fact more valuable,—that then, although the act of the defendant was a technical wrong, yet that the plaintiff, under such circumstances, would only be entitled to nominal damages." *Held* erroneous, and for that reason a new trial ordered.

II. Where a tenant, during the continuance of his term, made material and essential alteration of the buildings, and erected additions without the consent of his landlord—*held*, that he was not entitled to any remuneration for the materials and erections, even although the general value of the premises were thereby enhanced; upon the principle that, the act being tortious,

* In New York, an action for waste is given by statute against guardians, tenants by the courtesy, tenants in dower, for life or years, or their assigns. If the action be brought by any other than a tenant in common or joint tenant, the plaintiff recovers the place wasted, and treble the damages assessed by the jury.[1] If it be brought by a tenant in common, or joint tenant, against his co-tenant, the plaintiff may elect to take treble damages or to have partition of the premises; and in case he elects the latter, the object is to be effected by actual partition or sale, and in either case the single damages found by the jury are to be deducted from the defendant's share.[2] Damages were not recoverable at common law, as we have said, for waste committed pending the action of waste; and this is provided for by the same statute, which declares, that after the commencement of any action for the recovery of land or for its possession, the court may, by order, restrain the defendant from committing waste; but in the action of waste itself, the positive language of the above provision probably goes far

he could not claim any benefit or remuneration for his own wrong.

III. In an action on the case in the nature of waste, the jury, in estimating the damages, are not to take into consideration whether the general value of the premises have been enhanced or depreciated by reason of the act of the defendant, but simply whether they are depreciated as to the plaintiff. In such action, on estimating the plaintiff's damages, where the alterations and changes made by the tenant are of such a nature as to admit of the premises being restored to their condition at the time of the demise, the jury may take into consideration what sum would be equivalent to the costs and expenses incident to the restoration of the demised premises to their original state at the time of the demise. Under a declaration properly framed for that purpose, if the premises are, at the time of their surrender, by the act of the defendant, rendered untenantable, the jury may also take into consideration the value of the rent, or the use of the premises, for such period of time as would be requisite to put them in a tenantable condition.

IV. If the changes amount to a total destruction of any part of the demised property, such as shade trees and ornamental shrubbery, the jury may also take into consideration the actual value of the property totally destroyed, with reference to their original state and condition at the time of the demise, and their value to the owner of the reversion.

[1] Co. Civ. Proc. §§ 1651–1655. In an action brought by a remainderman in fee for injury to the inheritance, the inquiry should not embrace the present damage to the property. Van Deusen *v.* Young, 29 N. Y. 9.

[2] Co. Civ. Proc. §§ 1656, 1658.

enough to give damages for waste committed pending the suit. The effect of this statute has been said[1] to be to give the Supreme Court the same power to restrain and prevent waste, which is exercised by the Court of Chancery; and in this case, and in another,[2] it was held that the order might be made *ex parte*. And in a later case it has been said[3] to be a copy of the statute of Marlbridge.[4] Independent of the statute, however, there is no doubt that an action on the case can always be maintained, in which the party injured will recover the damages which he has actually sustained.[5] In such a proceeding, however, the forfeiture of the place wasted is waived, at least as far as the proceeding itself is concerned.** In an action in the nature of waste for cutting down trees on an estate, the damages are not necessarily confined to the value of the timber removed, but may include also the permanent injury to the inheritance.([a])

* The statute of Gloucester, in regard to waste, has been declared to be a part of the law of Massachusetts, except in regard to tenants in dower.[6] **

[1] Savage, J., in The People *v.* Alberty, 11 Wend. 160, 162.

[2] Bush *v.* Phillips, 3 Wend. 428.

[3] By Nelson, J., in Carris *v.* Ingalls, 12 Wend. 70.

[4] As to estrepement of waste in Pennsylvania, see Dickinson *v.* Nicholson, 2 Yeates 281.

[5] Winship *v.* Pitts, 3 Paige 259.

[6] Sackett *v.* Sackett, 8 Pick. 309. See Padelford *v.* Padelford, 7 Pick. 152, and particularly as to what is waste. In Pennsylvania, as to what is waste, see Hastings *v.* Cruncklcton, 3 Yeates 261, and Shult *v.* Barker, 12 S. & R. 272.

([a]) Harder *v.* Harder, 26 Barb. 409.

CHAPTER XXXII.

THE MEASURE OF DAMAGES IN ACTIONS UPON REAL COVENANTS.

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Introductory.

§ 951. **Real covenants—Restricted recovery.**—There would seem at first sight no reason why the measure of damages in an action on a covenant inserted in a conveyance of real property should differ in principle from that upon a similar covenant relating to personal property. The intention of the covenants being to assure the title of the grantee, he would seem, in case of failure, to be entitled to recover the whole value of what he lost at the time of the loss. Such, however, cannot be said to be the rule with regard to real covenants, except in a few jurisdictions. We find the measure generally to be the consideration or price paid for the land, and recited in the deed. That is, the damages may be equal to this, or less than this (*e. g.* in case of partial eviction), but not greater, no matter what the value of the land of which the grantee has been deprived. The reason to be assigned for this remarkable difference is probably to be looked for in the peculiar origin of our system, and the view of landed property taken in a condition of society very different from our own. We are so accustomed to look upon land as something to be bought and sold in the market, and having for the most part an

easily ascertainable market value measured in money, that it is not easy to picture to ourselves a state of society in which there was absolutely no market price for land, and when its value depended not upon a pecuniary rental but upon the personal services which its holding entailed. Nevertheless it was in such a state of society that covenants in deeds were first introduced, and as we shall presently see, at the time of their introduction, the idea of a pecuniary standard of compensation for their breach was wholly absent. The design of the ancient warranty was that in case of disseisin, the grantee should be able to compel his grantor to put him in possession of lands as good as those which he had lost—a kind of specific performance. The idea of the loss of a good pecuniary bargain was foreign to the existing legal and social order. As the value of land was not measured in money, so there was no fluctuation in the market, and purchasers did not acquire title with the intention of subsequently conveying to a new purchaser at a profit. Even when the next step was taken and the ordinary purchase and sale of lands began to become common, the idea of fluctuation in value was not thought of, and the consideration named in the deed began to be regarded as a pecuniary equivalent for the old agreement to enfeoff of lands of equal value. Instead of getting land of equal value the plaintiff was to get what both parties had by consent substituted for it—the consideration. So strongly fixed was the old idea, that it was not perceived until at a comparatively recent date that to take the consideration as an arbitrary limit violates all the general rules governing the measure of damages upon breaches of contract applicable in such a case. Thus it violates the rule that the plaintiff should recover the *value* of what he has lost; that this value is measured at the time of the breach and not

at the time of the contract; that the recital of a price does not measure it; while it introduces a new rule wholly at variance with the ordinary rules of interpretation, that makes the mere consideration of a contract a sort of liquidated damages for its breach. Moreover, it introduces a rule which cannot be always applied, but must give place to some other whenever the consideration is not mentioned in the deed and cannot be proved. These are certainly formidable objections to the rule, which nevertheless in most jurisdictions still preserves its vitality, and makes the compensation in actions upon covenants in deeds in a great measure arbitrary.

§ 952. **The ancient warranty.**—* The warranty of the ancient English law was in substance a covenant, whereby the grantor of an estate of freehold and his heirs were bound to warrant the title, and either upon voucher or judgment in a writ of *warrantia chartæ*, to yield other lands to the value of those from which there had been an eviction by a paramount title.[1] Upon eviction of the freehold, no personal action lay at common law upon the warranty. The party had only a writ of *warrantia chartæ* upon his warranty to recover a recompense in value to the extent of his freehold.[2] For reasons assigned by Blackstone,[3] in modern practice the covenant has totally superseded the warranty; and to this end various statutes have contributed. Such is the statute[4] making void all warranties by tenant for life, as against any reversioner or remainder-man; and as against the heir, all collateral warranties by any ancestor who had no estate of inheritance in possession; and these statutes have been generally re-enacted in this country.[5]

[1] Co. Litt. 365 *a*, and Reeves' Eng. Law, 448.

[2] 4 Kent's Com. 469.

[3] 2 Bl. Com. 300; and see, also, Co. Litt. 384 *a*, for "divers other diversities between warranties and covenants, which yield but damages."

[4] 4 and 5 Anne, c. 16, § 21.

[5] It is certainly so, at least in New York. The statute of 4 and 5 Anne, c.

§ 953. **Personal covenants in deeds.**—The usual personal covenants contained in a deed, the rule of damages in relation to which we shall now proceed to examine, are: *First*, that of seizin, or that the grantor is lawfully seized; *Second*, that he has good right to convey, which has been called synonymous with the covenant of seizin;[1] *Third*, that the premises are free from incumbrances; *Fourth*, for quiet enjoyment, or that the grantee shall quietly enjoy; *Fifth*, of warranty, or that the grantor shall warrant and defend the title against all lawful claims; and, *Sixth*, the covenant for further assurance,[2] or that the grantor will execute any further conveyances, to perfect the title, which the grantee can legally require.

In regard to all these covenants the rule is general, that no substantial relief will be given till the party complaining has actually suffered injury. It is not sufficient that he is menaced by an outstanding title or incumbrance. The covenantee cannot have anything more than nominal damages until he has been damnified in consequence of a breach of the covenant.[3] But it often becomes a question what constitutes a breach, and what a damage, sufficient to found a claim for remuneration.

In regard to the first three, if the title is defective, or incumbrances exist at the time of the conveyance, there is a breach as soon as the deed is executed. But those of a warranty and quiet enjoyment are prospective, and an actual ouster or eviction is, in general, necessary to constitute a breach.[4] It is of the rule of damages for

16, was re-enacted in New York in 1788; and finally the Revised Statutes of the same State (vol. i, p. 739, § 146) have abolished both lineal and collateral warranties with all their incidents, and have made heirs and devisees answerable upon the covenant or agreement of the ancestor or testator, to the extent of the lands descended or devised. And it has been further declared (sec. 140), that no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not.

[1] Rickert *v.* Snyder, 9 Wend. 416.

[2] Dimmick *v.* Lockwood, 10 Wend. 142.

[3] Nyce *v.* Obertz, 17 Ohio 71.

[4] 4 Kent's Com. 471.

eviction, in a suit brought to enforce these covenants, that we shall first speak.

It is apparent that the real covenants are, to some extent, cumulative; thus a covenant for quiet enjoyment is broken by an eviction under a prior mortgage, which would equally be a breach of that against incumbrances. The rules of damages on the various covenants consequently run into each other; but the most intelligible mode of treating the subject will be, as far as possible, to consider them separately.

§ 954. **Civil law analogies.**—First, however, we will examine the analogies of the civil law. The *stipulatio duplex* was the remedy provided by the Roman law for cases of eviction,[1] and for the breach of warranties that were sometimes required on the sale of property under the *Edictum Ædilium*.[2] And by the *stipulatio*,

[1] Pothier, Pandectes, par Brèard Neuville, vol. VIII, p. 97.

[2] The *Edictum Ædilium* was applied more particularly to sales of chattels than to real estate; but it will not be considered out of place here.

Aiunt ædiles, "Qui mancipia vendunt, certiores faciant emptores quid morbi vitiive cuique sit; quis fugitivus, errove sit; noxave solutus non sit; eademque omnia cum ea mancipia venibunt, palam ac recte pronuncianto. Quod si mancipium adversus ea venisset, sive adversus quod dictum promissumve fuerit quum veniret, fuisset, quod ejus (nomine) præstari oportere dicetur, emptori, omnibusque ad quos ea res pertinet, judicium dabimus ut id mancipium redhibeatur. Si quid autem post venditionem traditionemque deterius emptoris opera, familiæ procuratorisve ejus factum erit; sive quid ex eo post venditionem natum, acquisitum fuerit, et si quid aliud in vinditione ei accesserit sive quid ex ea re fructus pervenerit ad emptorem; ut ea omnia restituat. Item si quas accessiones ipse præstiterit, ut recipiat.

"Item si quod mancipium capitalem fraudem admiserit, mortis consciscendæ sibi causâ quid fecerit, inve arenam depugnandi causâ ad bestias intromissus fuerit; ea omnia in venditione pronuncianto; ex his enim causis judicium dabimus. Hoc amplius, si quis adversus ea, sciens, dolo malo vendidisse dicetur, judicium dabimus." Dig. lib. xxi, tit. 1, first part, § 1, Ulp. ad Ed. Ædil.

This edict gave three species of actions: (1) the *actio redhibitoria*, which was similar to our action founded on the right to return the chattel and demand the price paid; (2) the *actio estimatoria*, or *actio quanti minoris* analogous to our action for the difference between the actual value and the value that the article would have had if without blemish, or according to the warranty or representation; and (3) the action grounded on the vendor's fraud, given by the last section. And the edict applied to all sorts of animals as well as to slaves. Pothier, Pandectes, ed. de Brèard Neuville, vol. VIII, pp. 8 and 10. And in certain cases to real estate, p. 55.

As to the rule of damages in the actions *redhibitoria et quanti minoris* various cases are stated in the Digest.

the rule of damage was in most cases fixed at double the price of the article in question. *Quod autem diximus, duplam promitti oportere, sic erit accipiendum, at non ex omni re id accipiamus; sed de his rebus quæ pretiosores essent, si margarita forte, aut ornamenta pretiosa vel vestis serica, vel quid aliud non contemptibile veneat.*[1]

Under the system of the civil law, as introduced into modern Europe, as no distinction was made on this subject between real and personal property, or *mobiles* and *immobiles*, so the remuneration was the same whether the claim was founded on the non-delivery of the article, or an eviction after possession.[2] And in all these cases the price of the article seems to have been the basis of the measure of damages; but as with chattels, so with land, the increased value of the property was taken into account, and for this the party evicted had a right to claim. A distinction was, however, made between the seller in good faith and the party who knew he had no title to convey. Thus, if by reason of circumstances which

Labeo scribit, "Si uno pretio plures servos emisti, et de uno agere velis, (inter) æstimationem servorum proinde fieri debere, atque ut fieret in æstimationem bonitatis agri, quum ob evictam partem fundi agâtur." Dig. lib. xxi, tit. 1, § 72, Pomp. lib. 17.

"Si plura mancipia uno pretio venierint, et de uno eorum ædilitia actione utamur, ita demum pro bonitate ejus æstimatio fiat, si confuse universis mancipiis constitutum, pretium fuerit. Quod si singulorum mancipiorum constituto pretio, universa tanti venierunt, quantum ex consummatione singulorum fiebat, tunc cujusque mancipii pretium, seu pluris, seu minoris id esset, sequi debemus." Dig. lib. xxi, § 36.

So interest was to be paid to the buyer on the price given; and if the slave had made anything while in the buyer's possession, but without his means or assistance, such acquisitions were to be returned with the slave to the purchaser. Poth. Pan. vol. VIII, p. 75.

And in certain cases both the vendor and purchaser were held to give each other guarantees, to which the rule of the *stipulatio duplex* applied. Poth. Pan. vol. VIII, p. 99. The rule of damages in the *actio redhibitoria* was not, however, always the double value.

Redhibitoria actio duplicem habet condemnationem modo enim in duplicem, modo in simplum condemnatur venditor. Nam si neque pretium, neque accessionem solvat, neque eum qui eo nomine obligatus erit, liberet, dupli pretii et accessionis condemnari jubetur; si vero reddat pretium et accessionem, vel eum qui eo nomine obligatus est, liberet, simpli videtur condemnari. Dig. lib. xxi, tit. 1, § 82.

[1] Dig. lib. xxi, tit. 2, 1, 37, § 1, Pothier, Pan. ed. Brèard Neuville, vol. VIII, p. 102.

[2] Pothier, Contrat de Vente, part II, ch. i, § 1; art 5, § 69.

could not have been foreseen at the time of the contract, the value should be very greatly augmented, the seller in good faith would be liable only for the highest sum to which the parties might have reasonably supposed that the value would rise;[1] in many cases, certainly, a difficult inquiry.

So, again, the seller in good faith was only liable for direct damages; while more remote loss would be charged upon the seller in bad faith. Thus, if after the purchaser entered into possession, he should establish an inn on the premises and be subsequently evicted, the seller in good faith was not chargeable for the injury done to the business of the inn. But the seller in bad faith would in such a case be held liable.[2] And even the seller in good faith would be held answerable under similar circumstances, if, at the time of the bargain, the property was intended to be used as an inn. In all these cases much was left to the discretion of the judge.[3]

It was held by the masters of the civil law, that the fortuitous depreciation of the property did not alter the rule; as if, after the contract, buildings were to burn down, and eviction subsequently take place, the measure of damages would still be the price paid; and so it would probably be held with us.[4]

§ 955. **French Code.**—In the French Code the subject of evictions is treated with the usual brevity, order, and precision of that great work. The clauses which relate to the subject are as follows:

[1] Pothier, Contrat de Vente, part II, ch. i, § 2; art. 5, § 130.

[2] Pothier, Vente, part II, ch. i, § 1; art 5, § 136.

[3] Observez, says Pothier, § 138, que par la liquidation et estimation de ces dommages, on doit user de beaucoup plus de modération à l'égard d'un vendeur de bonne foi qu'à l'égard d'un vendeur de mauvaise foi.

This distinction between the vendor acting in bad faith and *bona fide*, will be found clearly illustrated in Lord Kaimes' Equity, 270; Erskine's Inst. 125; and see, also, Green *v.* Biddle, 8 Wheat. 1.

[4] Pothier, Vente, Art. 69.

Where a warranty has been given, or where no stipulation has been made on this subject, in such case, if the purchaser is evicted, he is entitled to demand from the seller:

I. The restitution of the purchase-money.

II. The restitution of any mesne profits which he may be obliged to pay over to the proprietor who evicts him.

III. The expenses incurred on the demand under the warranty of the buyer, and those incurred by the person originally making the demand.

IV. The damages and interest as well as the expenses and legal costs of the contract.

If, at the time of the eviction, the thing sold proves to be lessened in value or considerably injured, whether by the negligence of the buyer or owing to accidents resulting from superior force, the seller is in either case liable for the entire purchase-money.

But if the diminution in the value of the article has produced any profit to the buyer, the seller has a right to deduct from the purchase-money a sum equal to this profit.

In case the thing sold is increased in value at the time of the eviction, and even if such increase be independent of any acts of the purchaser, yet he is entitled to receive from the seller its actual value over and above the purchase-money.

The seller is bound to reimburse the purchaser, or to cause him to be reimbursed by the party evicting him, for all actual improvements and beneficial repairs that he shall have made to the property.

If the seller has sold the lands of a third person in bad faith, he will be compelled to reimburse the purchaser for all sums which he may have expended upon them, although such expenses be merely pleasurable or fanciful.[1] **

Covenants of Warranty and for Quiet Enjoyment.

§ 956. **What constitutes a breach.**—* That there must be an actual loss of the land to support the plaintiff's claim, is clear;[2] otherwise he is entitled to recover nominal dam-

[1] Cod. Civ. §§ 1630–1635.

[2] Marston *v.* Hobbs, 2 Mass. 433. In this case, Parsons, C. J., defines the effect of the various covenants with great clearness. See, also, Twambly *v.* Henley, 4 Mass. 441; Bearce *v.* Jackson, 4 Mass. 408; Chapel *v.* Bull, 17 Mass 213.

ages only.[1](a)** So the grantee of land with warranty, who has conveyed all his interest therein with warranty, cannot maintain an action against his grantor for a breach of the warranty subsequently occurring, unless he is compelled to pay damage on his own covenant of warranty.[2](b) Upon the plaintiff's eviction, the right of action is immediate and complete, and the whole damages are to be recovered in one action.(c)

*In North Carolina, where it appeared that at the time of the execution of the deed to the plaintiff, and previous thereto, a third person was in possession of the premises under a paramount title, it was held that this was sufficient to constitute a breach of the covenant for quiet enjoyment;[3] and in another case,[4] the Supreme Court of the United States said: "If the grantee be unable to obtain possession in consequence of an existing possession or seizin by a person claiming and holding under an elder title, this would certainly be equivalent to an eviction and a breach."[5]**

[1] Waldron *v.* McCarty, 3 Johns. 471; St. John *v.* Palmer, 5 Hill 599, and cases there cited.

[2] Wheeler *v.* Sohier, 3 Cush. 219; the court said: "The plaintiff has not suffered any damage, and he never may sustain any. He is liable on his warranty, it is true; but before he has suffered he cannot sue for indemnity, there being no certainty that he ever will be damnified."

[3] Grist *v.* Hodges, 3 Dev. 198.

[4] Duvall *v.* Craig, 2 Wheat. 45, 61.

[5] It is very correctly stated by the learned reporter, in a note to the case of St. John *v.* Palmer, 5 Hill 599, that these cases are opposed to the New York rule. Waldron *v.* McCarty, 3 Johns. 471; Kortz *v.* Carpenter, 5 Johns. 120; Kerr *v.* Shaw, 13 Johns. 236; Webb *v.* Alexander, 7 Wend. 281; St. John *v.* Palmer, 5 Hill 599. The language in that State has uniformly been, that the covenant of quiet enjoyment goes to the *possession* and not to the *title*, and that a disturbance of the possession is indispensable. In the case last cited, Bronson, J., said: "If the covenantee *never had the possession*, or if he had the possession and retains it still, it is impossible that there should have been an eviction, and no action

(a) Brandt *v.* Foster, 5 Ia. 287; Graham *v.* Baker, 10 Up. Can. C. P. 426; Snider *v.* Snider, 13 Up. Can. C. P. 157; Bannon *v.* Frank, 14 Up. Can. C. P. 295.

(b) *Acc.* Baxter *v.* Ryerss, 13 Barb. 267; *cf.* Sweet *v.* Bradley, 24 Barb. 549; Burt *v.* Dewey, 40 N. Y. 283.

(c) Van Zandt *v.* The Mayor, 8 Bosw. 375 (*semble*).

In Wisconsin it has been held, still further, that if the land is unoccupied land to which the grantor had no title, there is a constructive eviction at once, and the grantee may recover full damages on his covenant; but if the grantor afterwards obtains good title, and the grantee is not actually kept out of possession, he can recover compensation only for such damage as may have been done to the land by the true owner since the date of the conveyance.(a)

* It is well established that the mere existence of a paramount legal title is not sufficient to constitute a breach of these covenants, and that the plaintiff must allege and prove an ouster or eviction by a paramount title.[1]

It need not be, however, by process of law; the grantee may surrender possession, but, in such case, he assumes the whole burden of proving that the title to which he surrenders without contest, is actually paramount to that derived from his grantor.[2] **

The only subject, however, with which we are here concerned is the measure of damages in the case of a covenant which has been broken. Two leading rules have been laid down. These we will now examine, noting their various modifications, the States in which they have respectively found favor, and the comparative merits of each.

§ 957. **Recovery of consideration on total breach—New York rule.**—* The question as to the measure of compensation came up at an early day in the State of New

will lie, however hard the case may seem to be. The grantor should have protected himself by other covenants."

[1] See 4 Kent's Com. 460; 2 Saunders, 181 *b.*, n. 10; Foster *v.* Pierson, 4 T. R. 617, 621.

[2] St. John *v.* Palmer, 5 Hill 599. And the rule is the same in Massachusetts. Hamilton *v.* Cutts, 4 Mass. 349; Sprague *v.* Baker, 17 Mass. 586.

(a) McInnis *v.* Lyman, 62 Wis. 191.

York.[1] The defendant's testator, Ten Eyck, had conveyed certain lots in Albany to one Walsh, for £300. Walsh had conveyed to Staats, and Staats to Chinn, who had been evicted, and had recovered against the plaintiff Staats. The covenants in Ten Eyck's deed were of seizin and for quiet enjoyment; and the two points were, first, whether the plaintiff was entitled to recover the value at the time of eviction, or only at that of the purchase, and to be ascertained by the consideration given; and, secondly, if the latter, whether the plaintiff was entitled to interest on the purchase-money and the costs of the eviction. The court, in the course of a very able opinion, said, that the rule at common law on a warranty on a writ of *warrantia chartæ*, was that the demandant recovered in compensation only for the land at the time of the warranty made,[2] and that he did not find that the law had been altered since the introduction of personal covenants.

"Upon the sale of lands, the purchaser usually examines the title for himself, and in case of good faith between the parties (and of such cases only I now speak), the seller discloses his proofs and knowledge of the title.

"The want of title is, therefore, usually a case of mutual error; and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be, if

[1] Staats *v.* Ten Eyck, 3 Caines 111.

[2] The language of one of the year books, as to the rule on warranties, may be worthy of notice. 6 Ed. II, 187:

En un breve de dower le tenant vouch agar' et le gar fist defaute, le grant cape retorne ove la extent, ... que la terre est extend trop haut qe chescun acr' de terre est extendu a xv, ou ele ne voleit al' houre q'e ele passa hors de nostre seizine qe iiii, et qe ele est bien compote marle et ovesque ceo bien edifie et ne fut pas en le temps de alienation p. qi nous prioins aver extente autr: qe n'est fait issi qe nous puissons faire a la value soloin ceo que ele passa hors de nostre seizine. . . . . Et nota qe Ber' dit que si le vic, fist estendre la terre plus haut qe ele ne volust en temps de alienation quant breve de seizine luy voudra qe le tennant poet avoir bon remidie vers luy apres ceo p. breve.

Et sic nota la terre le tennant q'est gar doit estre estendu solon ceo qe ele valust en temps de alienation et non pas en temps de recoveryr.

that rise was owing to the taste, fortune, or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser, without the hazard of absolute ruin. . . . .

"To find a proper rule of damage in a case like this, is a work of some difficulty; no one will be entirely free from objection, or not at times work injustice. To refund the consideration, even with interest, may be a very inadequate compensation, when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet to make this increased value the criterion where there has been no fraud, may also be attended with injustice, if not ruin.

"A piece of land is bought solely for the purpose of agriculture; by some unforeseen turn of fortune it becomes the site of a populous city, after which an eviction takes place. Every one must perceive the injustice of calling on a *bona fide* vendor to refund its present value, and that few fortunes could bear the demand. Who, for the sake of one hundred pounds, would assume the hazard of repaying as many thousands, to which value the property might rise, by causes not foreseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee? . . . .

"To prevent an immoderate assessment of damages, when no fraud had been practiced, Justinian directed that the thing which was the object of the contract should never be valued at more than double its cost. . . . . Rather than adhere to the rule of Justinian, or leave the matter to the opinion of a jury as to which may or may not be excessive, some more certain standard should be fixed on. However inadequate a return of the purchase-money must be in many cases, it is the safest measure that can be followed as a general rule. This is all that one party has received, and all the actual injury occasioned by the other. I speak now of a case, and such is the present, where the grantee has not improved the property by buildings or otherwise, but where the land has risen in value from extrinsic causes. What may be a proper course when dwelling-houses or other buildings and improvements have been erected, we are not now determining. . . . . Without saying, then, what ought to be the rule, where the estate has been improved after purchase, my opinion is, that where there has been no fraud—and none is alleged here—the party evicted can recover only the sum paid, with interest from the

time of payment, where, as is also the case here, the purchaser derived no benefit from the property, owing to a defective title. The plaintiff must also be reimbursed the costs sustained by the action of ejectment."

§ 958. **Improvements—Excluded by New York rule.**—In a subsequent case,[1] where land had been conveyed with covenants of seizin and quiet enjoyment, and both broken, the questions were raised whether the plaintiff was entitled to recover damages for the improvements made by him, and for the increased value of the land itself. As to the latter point, all the court appear to have concurred with the case last cited; but as to the question of improvements, there was a disagreement. Spencer, J., was disposed to allow for beneficial improvements. He said (p. 14):

"Extravagant cases have been put hypothetically to show the enormous injustice of the rule that the vendor must be answerable for improvements. It has been asked if a piece of land, thus sold with covenants, should become the site of a flourishing city, what fortune could, under a rule allowing for improvements, withstand ruin? It may be retorted to such a question, what is to become of the industrious citizen or mechanic who has spent his hard earnings in erecting his little house or workshop, relying on the covenant in his deed, if he can only get back his purchase-money and interest? . . . . I lay it down as a rule, which cannot require much illustration to enforce it on the score of analogy and justice, that, in actions for a breach of covenant, the damages are to be estimated according to the value of the thing when the covenant was broken. Thus, in a covenant for the delivery of specific property at a given day, in case of a failure, the rule invariably is to allow in damages the value of the thing on the day it ought to have been delivered, and when the covenant was broken. . . . . It follows, from the view I have taken of this question, that the plaintiff under the covenant for *quiet enjoyment* may recover the improvements, and that under the covenant *of seizin* he could not, unless the grantee was seized by virtue of the deed,

[1] Pitcher *v.* Livingston, 4 Johns. 1.

and has been evicted under a title paramount. . . . . It has, however, been urged that the introduction of the covenants of seizin and for quiet enjoyment were substitutes for the covenant of warranty, and that the same rule ought to follow the substituted covenants. It appears to me much more proper to consider the introduction of personal covenants in the alienation of real property, as immediately assimilating themselves to other personal covenants and contracts, and as subject to the same rules of construction, and the same rule of damages whenever they are broken. If so, the covenant for quiet enjoyment was not broken until the eviction, and the rule of damages would be the property lost at that time, which would include the price paid for the land, and the value of those erections and improvements which had been added at the plaintiff's expense. It is supposed that though the covenants of seizin and for quiet enjoyment are distinct, and regard different objects, yet that where the first fails the latter is merged in it. This principle strikes me as illogical and unfounded in authority.

"There are authorities which show that where, in a deed, a man covenants that he hath a good right to convey, etc., and that the party shall quietly enjoy, one covenant goes to the title, and the other to the possession; and why a person who has broken two distinct agreements should protect himself from a responsibility on both, and be liable only on the least extensive one, surpasses my powers of comprehension."

The other members of the court were, however, of a different opinion. Van Ness, J., said (p. 7):

"In Staats *v.* Ten Eyck, the court determined that the plaintiff was not entitled to recover any damages on account of any increased value of the land. Here a distinction is attempted to be made between an appreciation of the land itself, and that appreciation of it which is produced by the erection of buildings, or the labor bestowed upon it in clearing and cultivating; a very nice, and, as I apprehend, a speculative distinction, to which it would be difficult, if not in most cases impossible, to give any practical effect without danger of the most flagrant injustice. . . . .

"It is conceded that upon the covenant of *seizin* only, the recovery is to be confined to the consideration and interest. On the covenant for *quiet enjoyment*, therefore, the plaintiff must rely

to recover compensation for his improvements. Let us, then, examine whether, consistently with certain fixed legal principles, the covenantee can recover a greater sum of damages in any case under the covenant for quiet enjoyment than under the covenant of seizin?

"An eviction must be shown before a suit can be maintained on the former covenant. Not so, however, as to the latter; for that is broken, if the grantor has no title, the moment the deed is delivered, and the grantee has an immediate right of action. Whenever the eviction is occasioned by a total want of title in the grantor, then both the covenants of seizin and for quiet enjoyment are equally broken, and the grantee has his remedy on both. If he proceeds upon the first, he shall recover the consideration expressed in the deed, and the interest. But if he proceeds upon the last, it is said he shall recover according to the value at the time of eviction, and, as I have before remarked, he must be content to recover according to the then value, even though it amounts to one-half only of the consideration expressed in the deed.

"The case would then stand thus: When the deed contained both these covenants, if the property at the time of eviction be worth one-half of the consideration and interest, the grantee may, notwithstanding, upon the covenant of seizin recover the whole consideration and interest. But if the property happen to be worth double the consideration money and interest, by reason of the improvements made thereon, he may waive the covenant of seizin, and resort to the covenant for quiet enjoyment, and thus recover the whole amount. Can this be possible? It appears to me, that to give such an effect to these covenants is not reconcilable with any principle of law or justice.

"My understanding of the nature of these covenants, when both are contained in the same deed, is this: that the covenant of seizin, which relates to the title, is the principal and superior covenant, to which the covenant for quiet enjoyment, which goes to the possession, is inferior and subordinate. And I am not aware that a case can possibly occur where the grantee can recover a greater amount in damages for the breach of the latter than of the former; though there are many cases where he may recover less. The suit here is brought upon both covenants; and both, in consequence of the total failure of the defendant's title and the eviction, have been broken. The plaintiff, accord-

ingly, has a right to recover on both ; but as the amount of the recovery would, according to my ideas, be the same on each, he must elect on which of them he means to rely, and take nominal damages on the other. The plaintiff is entitled to but one satisfaction, and he has his remedy on either of the covenants at his election to obtain it. It will hardly be said that he can have judgment for the same sum on both the covenants. . . . . But I consider the question arising in this cause as settled by authority, and that, according to established rules of law, the plaintiff is not entitled to anything more than the value of the land as settled by the consideration in the deed.

" In suits upon the ancient covenant of warranty, beyond all dispute the recovery was restricted to the value of the land at the time of making the covenant. . . . . A personal action will not lie on the covenant of warranty upon eviction of the freehold (Bac. Abr. tit. Cov. C.) ; and for which reason, upon the introduction of alienations by bargain and sale, new covenants were devised, but solely for the purpose of securing to the bargainee the personal responsibility of the bargainor in case of a failure of his title. I think I am warranted in saying that it never was designed, by the insertion of these covenants, to establish any other rule of damages than what previously existed, because there is nothing in the terms of the covenants from which an intention to extend the liability of the covenantor can be inferred ; but the contrary is to be presumed, as not a single case is to be found where such a construction of these covenants, which were in a great measure substituted for the covenant of warranty, has ever obtained. . . . . If, then, on the covenant of warranty, the satisfaction recovered in land was to be equivalent to the value of the lands granted, as it existed at the time when the covenant was made, I do conceive that we are bound to adopt a correspondent rule, when satisfaction is sought to be recovered in money in a personal action on the covenant for quiet enjoyment.

" Such a rule, moreover, I consider to be conformable to the intention of the parties. I question if one grantor out of ten thousand enters into these covenants with the remotest belief that he is exposing himself and his posterity to the ruinous consequences which would result from the doctrine contended for by the counsel for the plaintiff. By giving this doctrine our sanction, we should, in my apprehension, create a most unex-

pected and oppressive responsibility never contemplated by the parties, and inflict an equally unmerited punishment upon grantors acting with good faith, and having a perfect confidence in the validity of their title to the land, which they have transferred for what it is reasonably worth."[a] **

§ 959. **Allowed in some jurisdictions.**—These conclusions as to improvements necessarily lead to the general rule adopted in New York and other States, that the measure of damages is limited to the consideration, together with interest, and the expenses of defending possession. Nevertheless, in one of these States [b] it has been intimated that the plaintiff might be allowed compensation for expensive improvements, if he had not been in possession long enough to be allowed the value of them as against the owner in the eviction suit under the statute of betterments.

On the other hand, in England and those States which, as we shall see, adopt a different rule, and allow the plaintiff to recover the *value* of the land at the time of eviction, without regard to the consideration, the value of improvements is necessarily included. Thus, in Bunny *v.* Hopkinson,[c] an action for breach of a covenant for quiet enjoyment, the Master of the Rolls allowed the full amount of the vendee's expenditures in converting the land to the purpose for which it was bought, by erecting buildings on it. It does not appear from the report that the purpose was known to the vendor, except as might be inferred from the lots being building land. The value of the improvements and the actual expense of making them seem to have been considered as identical.[d]

(a) *Acc.* Hunt *v.* Raplee, 44 Hun 149.
(b) Ela *v.* Card, 2 N. H. 175.
(c) 27 Beav. 565.
(d) *Acc.* Coleman *v.* Ballard, 13 La. Ann. 512.

§ 960. **Good faith required.**—It is to be noticed that the circumstances expressly reserved by the court (bad faith or fraud), in Staats *v.* Ten Eyck (*supra*), as those under which the New York rule would not be applicable, have been again referred to as perhaps necessitating a modification of the rule. Thus, in Taylor *v.* Barnes,([a]) Allen, J., said, "Whether it should be applied when the title fails by the fraud or fault of the grantor and covenantor is, at least, doubtful."

§ 961. **The New York rule followed in most States.**—1. *New York.*—The rule has been confirmed in New York by repeated decisions.[1]

2. *Pennsylvania.*—The general rule, as settled in New York, was adopted at an early day in Pennsylvania, and the price of the land at the date of the deed was taken as the measure of damages.[2] ([b])

3. *South Carolina.*—* In South Carolina, the rule was not at first adopted. It was held at Nisi Prius, in an action of covenant brought for a breach of warranty in a release of a lot of land in Charleston, by Pendleton, J., that there could be no doubt but that the measure of estimating damages in a case like the present was the value of the land at the time of the eviction; but only a part of the lot being taken, it was left to the jury to apportion the damages according to the amount of injury sustained, or give the full amount of the value of the lot; which

[1] Albee *v.* Harris, 9 Johns. 324; Kane *v.* Sanger, 14 Johns. 89; Baldwin *v.* Munn, 2 Wend. 399; Dimmick *v.* Lockwood, 10 Wend. 142; Kinney *v.* Watts, 14 Wend. 38; Moak *v.* Johnson, 1 Hill 99; Kelly *v.* Dutch Church of Schenectady, 2 Hill 105.

[2] Bender *v.* Fromberger, 4 Dall. 436, 441; Brown *v.* Dickerson, 12 Pa. 372.

([a]) 69 N. Y. 430, 434.

([b]) McClure *v.* Gamble, 27 Pa. 288; Hertzog *v.* Hertzog, 34 Pa. 418; McNair *v.* Crompton, 35 Pa. 23; Dumars *v.* Miller, 34 Pa. 319; Cox *v.* Henry, 32 Pa. 18; McCafferty *v.* Griswold, 99 Pa. 270; Allison *v.* Montgomery, 107 Pa. 455. So in case of a lease: McClowry *v.* Croghan, 31 Pa. 22.

latter was done.[1] In a subsequent action on covenant of warranty,[2] there was a difference of opinion on this point, Grimke, J., thinking the purchase-money and interest was the true rule. But Waties and Bay, JJ., thought the value of the lands at the time of the eviction was the best general rule; and on this principle the verdict was given. In an action of warranty of negroes,[3] an attempt was made to apply the same principle to chattels; but while the general rule was acknowledged, the particular case was considered an exception, and the court left it to the jury to give what they thought reasonable. Finally, in a subsequent case, the prior decisions as to real covenants were distinctly overruled, and the New York rule was adopted.[4](a) **

4. *Virginia.*—* In Virginia it was very early said,[5] that if a conveyance had been made with warranty, the value of the land at the time of eviction would fix the damages. This, however, was in equity; and the rule in that State seems to have been long involved in doubt. In a later case,[6] while the rule as just stated was again recognized, it was held not to apply to a conveyance of land with a general warranty of a specific quantity when the quantity fell short, and the value of the deficiency was fixed at the time of the contract. In another case,[7] the doctrine of the last decision was followed. But the rule we are considering does not appear to have controlled either of these cases; and more recently,[8] the whole subject was carefully examined by Green and Coalter, JJ., in able

[1] Liber *v.* Parsons, 1 Bay 19 (1785).
[2] Guerard *v.* Rivers, 1 Bay 265 (1792).
[3] Eveleigh *v.* Stitt, 1 Bay 92 (1789).
[4] Henning *v.* Withers, 3 Brev. 458; Ware *v.* Weathnall, 2 McCord 413; Bond *v.* Quattlebaum, 1 McCord 584; Furman *v.* Elmore, 2 N. & M'C. 189.
[5] Mills *v.* Bell, 3 Call 320 (1802).
[6] Nelson *v.* Matthews, 2 Hen. & Mun. 164 (1808).
[7] Humphrey *v.* McClenachan, 1 Mun. 493.
[8] Stout *v.* Jackson, 2 Randolph 132 (1823).

(a) Lawrance *v.* Robertson, 10 S. C. 8.

and conflicting opinions; but the case went off on another ground, Brooke, J., reserving his opinion. And the final decision seems to be that the purchase-money, interest and costs of eviction fix the measure of compensation.[1]

5. *Tennessee.*—In Tennessee, the purchase-money, with interest, makes the measure of remuneration.[2] ([a])

6. *Kentucky.*—So, too, in Kentucky, where it was held by the Court of Appeals, that in case of a covenant of warranty and eviction, "the value of the land at the time of sale to be ascertained by the purchase-money, if expressed in the deed or known, together with interest thereon, and the costs, extraordinary as well as legal, expended in defense of the title, is the measure of damages to be recovered; but if the purchase-money be not expressed in the deed, other means may be used to ascertain the value." The case was in chancery.[3]

7. *Ohio.*—In Ohio, in actions on the covenants of seizin and quiet enjoyment, the measure of damages, as a general rule, has been adjudged to be the consideration money and interest; and this rule has been applied to suits on the warranty of title.([b]) **

* In the same State, where the covenant of warranty is broken by reason of an assignment of dower by metes and bounds, the damages will go, not to the extent of the consideration money, nor of one-third of the consideration money of the deed, but the extent to which the value of

[1] Threlkeld *v.* Fitzhugh, 2 Leigh 451.
[2] Talbott *v.* Bedford, 5 Hall's Am. Law J. 330, cited in notes to Duvall *v.* Craig, 2 Wheat. 45, 64; Shaw *v.* Wilkins, 8 Humphreys 647. See also in Sumner *v.* Williams, 4 Hall's Am. Law J. 129, 147, the opinion of Luther Martin.
[3] Cox *v.* Strode, 2 Bibb 273, 280.

([a]) Mette *v.* Dow, 9 Lea 93.

([b]) Backus *v.* M'Coy, 3 Oh. 211; Dustin *v.* Newcomer, 8 Oh. 49; Foote *v.* Burnet, 10 Oh. 317; Clark *v.* Parr, 14 Oh. 118; Wade *v.* Comstock, 11 Oh. St. 71; Vail *v.* Junction R.R. Co., 1 Cin. Sup. Ct. 571.

the estate is diminished by carving out the life estate, taking one-third of the consideration money to be the value of one-third of the fee simple interest.[1] **

This rule prevails in almost every State outside of New England.([a]) In McGuffey *v.* Humes,([b]) the land

[1] Johnson *v.* Nyce, 17 Oh. 66.

([a]) Patrick *v.* Leach, 1 McCr. 250. *Alabama:* Kingsbury *v.* Milner, 69 Ala. 502. *Arkansas:* Logan *v.* Moulder, 1 Ark. 313; Carvill *v.* Jacks, 43 Ark. 439 (*semble*). *California:* McGary *v.* Hastings, 39 Cal. 360. *Georgia:* Davis *v.* Smith, 5 Ga. 274; Martin *v.* Gordon, 24 Ga. 533. *Illinois:* Buckmaster *v.* Grundy, 2 Ill. 310; McKee *v.* Brandon, 3 Ill. 339; Harding *v.* Larkin, 41 Ill. 413. *Indiana:* Blackwell *v.* Lawrence Co., 2 Blackf. 143; Sheets *v.* Andrews, 2 Blackf. 274; Burton *v.* Reeds, 20 Ind. 87; Wood *v.* Bibbins, 58 Ind. 392; Thomas *v.* Hamilton, 71 Ind. 277; Rhea *v.* Swain, 122 Ind. 272. *Iowa:* Swafford *v.* Whipple, 3 Green (Ia.) 261; Brandt *v.* Foster, 5 Ia. 287; Fawcett *v.* Woods, 5 Ia. 400. *Kansas:* Stebbins *v.* Wolf, 33 Kas. 765. *Kentucky:* Combs *v.* Tarlton, 2 Dana 464; Seamore *v.* Harlan, 3 Dana 410; Cummins *v.* Kennedy, 3 Litt. (Ky.) 118; Robertson *v.* Lemon, 2 Bush 301. *Louisiana:* Bissell *v.* Erwin, 13 La. 143; Hale *v.* New Orleans, 13 La. Ann. 499 (code); but the value of improvements may be recovered; Coleman *v.* Ballard, 13 La. Ann. 512. *Maryland:* Crisfield *v.* Storr, 36 Md. 129, 150. *Minnesota:* Moore *v.* Frankenfield, 25 Minn. 540; Devine *v.* Lewis, 38 Minn. 24. *Missouri:* Dickson *v.* Desire, 23 Mo. 151, 166; Tong *v.* Matthews, 23 Mo. 437; Lambert *v.* Estes, 13 S. W. Rep. 284 (Mo.); Dryden *v.* Kellogg, 2 Mo. App. 87. *Nevada:* Dalton *v.* Bowker, 8 Nev. 190; Hoffman *v.* Bosch, 18 Nev. 360. *New Hampshire:* Ela *v.* Card, 2 N. H. 175; Willson *v.* Willson, 25 N. H. 229; Foster *v.* Thompson, 41 N. H. 373; Winnepiseogee P. Co. *v.* Eaton, 18 Atl. Rep. 171 (N. H.). *New Jersey:* Stewart *v.* Drake, 9 N. J. L. 139; Morris *v.* Rowan, 17 N. J. L. 304. *North Carolina:* Wilson *v.* Forbes, 2 Dev. 30; West *v.* West, 76 N. C. 45; Ramsey *v.* Wallace, 100 N. C. 75, 83 (*semble*). *Oregon:* Stark *v.* Olney, 3 Ore. 88. *Tennessee:* Talbott *v.* Bedford, 5 Hall's Am. Law J. 330; Hopkins *v.* Yowell, 5 Yerger 305; McGuffey *v.* Humes, 85 Tenn. 26. *Texas:* Sutton *v.* Page, 4 Tex. 142; Simpson *v.* Belvin, 37 Tex. 674; Turner *v.* Miller, 42 Tex. 418; Glenn *v.* Mathews, 44 Tex. 400. *Virginia:* Lowther *v.* Com., 1 H. & M. 202; Crenshaw *v.* Smith, 5 Munf. 415; Wilson *v.* Spencer, 11 Leigh 261; Click *v.* Green, 77 Va. 827; Sheffey *v.* Gardiner, 79 Va. 313. *West Virginia:* Butcher *v.* Peterson, 26 W. Va. 447. *Wisconsin:* Hall *v.* Delaplaine, 5 Wis. 206; Conrad *v.* Grand G. U. O. Druids, 64 Wis. 258. So also in *Ontario:* Brennan *v.* Servis, 8 Up. Can. Q. B. 191; Graham *v.*

([b]) 85 Tenn. 26.

had been paid for in stock of a corporation at a fictitious valuation. It was held that the actual value of the stock was the measure of damages.

§ 962. **Assignee's damages.**—The same rules apply in an action by an assignee. In an action brought upon a warranty, by an assignee, the measure of damages has been held to be the sum which the assignor might have recovered had the action been brought in his name. The amount paid by the assignee for the right of action is not the rule. The warrantor must make good his warranty.[a] And the prevailing rule seems to be that the assignee of a right of action on the covenants in a deed may recover of the maker of the deed the consideration paid for the assignment, not exceeding what the grantee might have recovered, if he had brought the action. In other words, the maximum recovery is the original consideration. If the assignee paid less, he recovers less.[b] In Shorthill *v.* Ferguson [c] an assignee of the covenant was allowed to recover, though he only offered evidence to show that the title was doubtful. The action was said to be for breach of warranty, but it seems rather to have been for rescission, since the plaintiff was required to give up his deed.

§ 963. **Recovery of value at time of eviction—New Eng-**

Leslie, 4 Up. Can. C. P. 176. But in a later case, where the plaintiff was evicted by a dowress, and brought suit on the covenant for quiet enjoyment, it was held that the actual loss could be recovered in an action upon that covenant, though the consideration was natural love and affection only; for that covenant was not broken until loss happened. Hodgins *v.* Hodgins, 13 Up. Can. C. P. 146. By statute: *South Carolina:* Rev. Stat. '82, § 1832. *California:* Code, § 3304. *Dakota:* Code of '83, § 1951.

[a] Sweet *v* Bradley, 24 Barb. 549.

[b] Crisfield *v.* Storr, 36 Md. 129, 150; Mette *v.* Dow, 9 Lea 93; Eaton *v.* Lyman, 26 Wis. 61.

[c] 44 Ia. 249.

land rule.—* In Massachusetts, in a case[1] in which the action was brought on the covenant of warranty, Parsons, C. J., delivering the judgment of the Supreme Court of that State, said: "The court are of opinion, conformably to the principles of law applied to personal actions of covenant broken, to the ancient usages of the State, and to the decisions of our predecessors, supported by the practice of the legislature, that the plaintiff in this action ought to recover in damages the value of the estate at the time of the eviction." The land in this case had risen from $9,000 to $15,000, but whether by reason of actual improvements is not stated.([a])

In a later case,[2] it was held by the same court, that, as there was a covenant of warranty in the deed, if the plaintiff had been evicted, the jury should consider the value of the land at the time of the eviction as the proper measure of damages; but there being no eviction, it was held that the measure of damages on the covenant of seizin was the price paid and interest.[3]

But the same court decided,[4] that where administrators had conveyed a defective title with this covenant, it was broken at the moment of execution, and that the measure of damages was the consideration in the deed

[1] Gore *v.* Brazier, 3 Mass. 523, 546. (Decided in 1807). See also Sumner *v.* Williams, 8 Mass. 162, 222.

[2] Caswell *v.* Wendell, 4 Mass. 108 (1808).

[3] In 1807 (ch. 75, § 3), an act was passed in Massachusetts, allowing the tenant in real actions, in certain cases, compensation for his improvements, and giving the demandant the increased value of the premises, less the improvements, the provisions of which are incorporated in the Pub. Stats., ch. 173. Harris *v.* Newell, 8 Mass. 262; Knox *v.* Hook, 12 Mass. 329; see also Bacon *v.* Callender, 6 Mass. 303; Runey *v.* Edmands, 15 Mass. 291; Shaw *v.* Bradstreet, 13 Mass. 241; Chapel *v.* Bull, 17 Mass. 213; Heath *v.* Wells, 5 Pick. 140; The Society for Prop. of Gospel *v.* Wheeler, 2 Gall. 105.

[4] Sumner *v.* Williams, 8 Mass. 162, 221.

([a]) And compensation can be recovered for improvements made in good faith after notice of the paramount claim, since the plaintiff had a right to rely on the warranty. Cecconi *v.* Rodden, 147 Mass. 164.

and interest; "or, at most, that amount together with the plaintiff's expenses of defending the possession."

The rule as above established in Massachusetts, that where the covenant is in the future, and the estate in the meantime passes by force of the conveyance, and the grantee becomes seized, and is afterwards evicted by a paramount title, the value of the estate at the time of the eviction is the measure of the plaintiff's damages,— has been repeatedly since held in that State.[1] But it was said in a later case,[2] that this rule may be modified by special circumstances, as, for instance, "cases may be supposed where the outstanding mortgage, though assuming the form of a paramount title, which, if not redeemed, would take the whole estate and evict the covenantee; yet, being very small in amount in comparison with the value of the estate, it would be plainly for the interest of the owner and holder of the equity of redemption to redeem. In such case it would be quite unreasonable to hold that the covenantee on such an eviction should recover damages to the full value of the estate." And this doctrine has been reaffirmed.[3] It is to be borne in mind, that in Massachusetts the mortgagee obtains a conditional judgment, and is put in possession, after which the plaintiff may discharge the incumbrance, and restore himself to possession by paying the debt, with interest and costs of suit; and in such a case, the proper rule of damages was held to be the amount due on the mortgage, with the costs of the mortgage suit against the plaintiff.[4]

Maine.—The State of Maine has adhered to the rule of her parent, Massachusetts, that the value of the premises at the time of the eviction forms the necessary dam-

[1] Norton *v.* Babcock, 2 Met. 510, 518.
[2] White *v.* Whitney, 3 Met. 81, 89.
[3] Donahoe *v.* Emery, 9 Met. 63.
[4] Tufts *v.* Adams, 8 Pick. 547.

ages; and to this have there been added the expenses reasonably and actually incurred in the defense of the suit in which the grantee was evicted.[1]

Connecticut.—In Connecticut, as early as 1786, the same rule was declared.[2] The Superior Court said that in suits on the covenant of warranty the constant rule of the court had been to ascertain damages by the value of the land at the time of eviction. But the action being on a covenant of seizin, this rule was held not to apply. It was said that the purchaser might bring his action immediately upon discovering that his title was defective; and the jury, having computed the damages according to the consideration of the deed, the verdict was accepted by the court.

In the same State it was said: "We consider the rule to have been long since settled in this State, that upon the covenant of seizin the plaintiff has a right to recover the consideration money and interest, and on the covenant of warranty, the value of the land at the time of eviction. . . . . We think, too, that when the warrantor has been vouched in to defend his title, the costs which the plaintiff has actually been put to is also a fair ground of damages."[3] **

This rule has been generally followed in New England ([a]) (except in New Hampshire), and in Michigan.([b]) It prevails in Quebec: ([c]) and by the latest de-

[1] Cushman *v.* Blanchard, 2 Me. 266; Hardy *v.* Nelson, 27 Me. 525.

[2] Horsford *v.* Wright, Kirby 3.

[3] Sterling *v.* Peet, 14 Conn. 245, 254.

([a]) Swett *v.* Patrick, 12 Me. 9; Elder *v.* True, 32 Me. 104; Ryerson *v.* Chapman, 66 Me. 557; Williamson *v.* Williamson, 71 Me. 442; Boyle *v.* Edwards, 114 Mass. 373; Furnas *v.* Durgin, 119 Mass. 500; Drury *v.* Shumway, 1 D. Chip. (Vt.) 110; Park *v.* Bates, 12 Vt. 381; Keeler *v.* Wood, 30 Vt. 242.

([b]) Eaton *v.* Knowles, 61 Mich. 625.

([c]) Dupuy *v.* Ducondu, 6 Can. 425.

cisions it has been recognized as the English rule.(a) In a case in Maine the plaintiff was an assignee of a mortgage; the defendant, the assignor, had released part of the land covered by the mortgage, but assigned the whole mortgage in good faith. The land actually covered by the mortgage at the time of the assignment was then worth more than enough to satisfy the debt, but it afterwards became less valuable. In an action on the covenant of warranty in the assignment it was held that no more than nominal damages could be recovered.(b) Special circumstances were relied upon by the court to sustain them in their opinion; but on the facts stated the decision was no doubt correct. No possession of the released premises was ever given to the plaintiff; the covenant was therefore broken when the deed was delivered, and at that time the value of the security was greater than the debt.

§ 964. **General discussion of the rules.**—* The cases upholding the New York rule seem to have been mainly decided upon the analogy to the ancient real warranty,(c) and the assumed impropriety of applying a different rule to the covenant of quiet enjoyment from that which governs the covenant of seizin. But the rule adopted in regard to the real warranty was established when improvements were much more rare and far less rapid than at the present day; and there seems no reason which forbids a grantor from giving a more effectual remedy against a prospective than an im-

(a) Jenkins *v.* Jones, 9 Q. B. Div. 128.

(b) People's Savings Bank *v.* Hill, 81 Me. 71.

(c) Where the value of the land to which title failed was assessed as of the time of the original conveyance. Beauchamp *v.* Damory, 29 Edw. 3, 3*a*; 19 Hen. 6, 46*a* (pl. 95); 19 Hen. 6, 61*a* (pl. 26); Bro. Abr. *Recouverie in Value*, pl. 59; Ballet *v.* Ballet, Godbolt 151; Humphrys *v.* Knight, Cro. Car. 455.

mediate failure of title; nor is it easy to say why the price should be arbitrarily fixed on as the absolute measure of value in regard to lands, when in regard to chattels it is only *prima facie* evidence of that value. There seems great doubt, too, whether sufficient attention has been paid to the words of the covenant. What is the meaning of the phrase "*quiet enjoyment*," in regard to a city lot, for instance, which is of no use but for buildings, on which erections must be contemplated at the time of purchase by both parties, and of which, without such erections, no *enjoyment* can be had? May not a distinction be well taken between this covenant applied to such property and to farming land?**

* This rule destroys the value of all the usual covenants in leases, and is against the general principle in regard to chattels, by which we have seen that if a warranty in regard to them fails, the plaintiff is entitled to recover the difference between their actual value and that which they would have had if the warranty had been complied with. It is very frequently the case, that the rent in leases, especially where ground-rent for a long term is reserved, does not represent their real value to the lessee; that the lease or its good-will, as it is sometimes erroneously termed, is of great actual value; and that on an eviction the tenant must suffer positive loss. Why should a covenant, using the expressive phrase *quiet enjoyment*, be frittered away by an arbitrary assumption that the price paid was the real value?[1]** If we apply the

[1] It may be noticed here that the revisers of the Statutes of New York proposed to fix the measure of damages for eviction, at the value of the premises at the time *of eviction*, with interest and costs, and reasonable expenses of defending the title. But if the consideration were paid in money, it was to be taken as the value of the premises; and in case of partial eviction, the value of a part was to be estimated in proportion to the price paid for the whole. But this provision was not finally adopted. See the chapter on Alienation by Deed (part II, ch. i, art. iv, R. S. vol. III, p. 573), which suffered sadly in the hands of the Legislature.

ordinary common-law rule of compensation, the grantor, on breach of this covenant, should put the grantee in the same position as if the covenant had been compiled with. The covenant is broken when the vendee is ousted from possession. Compensatory damages, then, should equal the value of the land at the time of the eviction, for if the covenant had not been broken, that is what he would have had. The objection urged against this result, on the ground of hardship, seems of no great force, for there is nothing which requires the grantor to make such a covenant. He could refuse to give any covenant, or any but a covenant of seizin. If he chooses to make such a covenant, and the grantee relies on it, it seems a great hardship on the grantee that he should suffer the loss and have no remedy. In this country especially, where the rise in real property is often extremely rapid, and the expectation of it not infrequently forms to a purchaser the inducement to the investment, there seems no intrinsic equity in giving to a vendee as the sole compensation for his eviction from valuable real estate through the vendor's breach of covenant, even if an innocent one, the original purchase-money and interest, which often together amount only to a small proportion of the actual value of the property. The rule must find its defense in considerations of public policy, since the amount of damages necessary to compensate the vendee might in some cases ruin an innocent vendor.([a])

§ 965. **Proof of consideration.**—*Assuming it to be set-

([a]) The Supreme Court of Ohio, while recognizing the rule as settled in that State, said "that it will scarcely ever do exact justice to both parties, being either more or less than a fair compensation." Wade *v.* Comstock, 11 Ohio St. 71. Rawle (Covenants for Title, §§ 165, 166) offers the strongest arguments in support of the New York rule. He points out, however, that it should not apply in case of improvements which were in the contemplation of both parties at the time of the sale.

tled that the consideration paid furnishes the rule of damages, it still remains to be seen how far the price named as paid and received in the deed, is conclusive proof of that consideration. In England the cases are conflicting, and the rule appears to be against the admission of parol proof to contradict the deed.[1] In a case in the King's Bench[2] the court said: "The deed states the whole purchase-money to be well and truly paid. The parol evidence is that it never was paid, but a great part of it kept back; and that fact is wholly inconsistent with the statements in the deed, and therefore ought not to have been received in evidence." ** In New York a very accomplished judge has held this language:[3] "When the deed contains no covenant but that of seizin or general warranty, the consideration is not inserted as a mere matter of form, nor for the sole purpose of giving effect and operation to the deed; but it is inserted for the further purpose of fixing the amount of damages to which the grantee will be entitled, in case he is evicted. At least, such are my present impressions, though my brethren are inclined to a different conclusion. But it is not now necessary to decide the question." * But we submit, with deference, that any distinction as to the purpose for which parol proof is admitted, cannot be maintained. If good for one end, it must be good as to all. It would be a solecism for the tribunal to admit evidence to influence their minds as to one result, and to exclude it as to another. If a fact be established, all its legitimate results must follow, whether as to rights or remedies; and so it seems to be now at

[1] King *v.* Inhabitants of Scammonden, 3 T. R. 474; Rowntree *v.* Jacob, 2 Taunt. 141; Villers *v.* Beamont, 2 Dy. 146*a*; Mildmay's Case, 1 Co. 175; Vernon's Case, 4 Co. 1; Peacock *v.* Monk, 1 Ves. sen. 127; Craythorne *v.* Swinburne, 14 Ves. 160; Lampon *v.* Corke, 5 B. & Ald. 606.

[2] Baker *v.* Dewey, 1 B. & C. 704.

[3] Greenvault *v.* Davis, 4 Hill 643, 647, *per* Bronson, J.

length definitely settled in New York. Jewett, J., delivering the opinion of the Court of Appeals, said: "It is well settled that for the purpose of ascertaining the damages to which a plaintiff may be entitled in an action at law for the breach of the covenant of seizin in a deed, the true consideration, and that all or any part remains unpaid, may be shown, notwithstanding a different consideration is expressed in the deed, and although it contains an acknowledgment, on the part of the grantors, that it has been paid at the time of or before the execution of the deed."[1]** And accordingly * it seems to be well settled in this country, that, as between the original parties to the transfer, the consideration clause is open to parol proof.[2] (a)**

* But, though parol proof may be admitted as between the original parties, it is well settled that if the grantee has transferred the land, the consideration named is conclusive as between his assigns and the original grantor,

[1] Bingham *v.* Weiderwax, 1 N. Y. 509, 514.

[2] See the English and American cases elaborately reviewed in the Court of Errors in New York, in McCrea *v.* Purmort, 16 Wend. 460. See also Grout *v.* Townsend, 2 Hill 554. In New Jersey, see the subject examined in Bolles *v.* Beach, 22 N. J. L. 680, 692, where it is said: "When the deed acknowledges the payment of the consideration, it cannot be denied by the grantor, for the purpose of destroying the effect and operation of the deed; though it may be denied for the purpose of recovering the consideration money. This doctrine is now, in this country, supported by such a weight of authority as not readily to be disturbed."

(a) Patrick *v.* Leach, 1 McCr. 250; Belden *v.* Seymour, 8 Conn. 304; Martin *v.* Gordon, 24 Ga. 533; Howell *v.* Moores, 127 Ill. 67; Swafford *v.* Whipple, 3 Green (Ia.) 261; Williamson *v.* Test. 24 Ia. 138; Bullard *v.* Briggs, 7 Pick. 533; Smith *v.* Strong, 14 Pick. 128; Byrnes *v.* Rich, 5 Gray 518; Cook *v.* Curtis, 68 Mich. 611; Devine *v.* Lewis, 38 Minn. 24; Moore *v.* McKie, 5 Sm. & M. 238 (warranty of slaves); Lambert *v.* Estes, 13 S. W. Rep. 284 (Mo.); Morse *v.* Shattuck, 4 N. H. 229; Bingham *v.* Weiderwax, 1 N. Y. 509; Vail *v.* Junction R.R. Co., 1 Cin. Sup. Ct. 571; Stark *v.* Olney, 3 Ore. 88; Cox *v.* Henry, 32 Pa. 18; Garrett *v.* Stuart, 1 McCord 514. In an early case in Kentucky it was held that the consideration could not be disputed in an action at law, but that it could be inquired into in equity. Yelton *v.* Hawkins, 2 J. J. Marsh 1.

at least as against the latter.(a) In a case already cited,[1] Bronson, J., said: "It would work the grossest injustice to allow the covenantor to go into the question of how much was actually paid for the land, when the title has failed in the hands of an assignee." In this case it was held the *grantor* could not be allowed, as against the assignee, to show that the price paid was less than that named in the deed; but perhaps the same reasons do not apply against the *assignee*, if desirous to prove the price greater.**

And it is held, still further, that if it can be shown that a fixed part of the purchase-money was given for a specific parcel of land to which the title failed, that fixed sum is the measure of damages.(b) And it has been held that when such a parcel of land to which title failed was included by mistake, both parties having known it to be owned and possessed by another, that fact may be shown, not of course to contradict the boundaries of the deed, but to show that no consideration was paid for that parcel; and that the plaintiff's damages will therefore be nominal.(c)

In some cases a third party, having a bond for a deed, sells to the plaintiff and receives from him the consideration, while he pays a smaller amount to the defendant, his vendor; but for convenience the deed is made directly from defendant to plaintiff. In Massachusetts, in an action on the covenant of seizin, it has been held in such a case that the plaintiff might recover the value of the

[1] Greenvault *v.* Davis, 4 Hill, 643, 649.

(a) Illinois L. & L. Co. *v.* Bonner, 91 Ill. 114.

(b) Blanchard *v.* Hoxie, 34 Me. 376 (on the covenant of seizin); Guinotte *v.* Chouteau, 34 Mo. 154.

(c) Leland *v.* Stone, 10 Mass. 459; Barns *v.* Learned, 5 N. H. 264; Nutting *v.* Herbert, 35 N. H. 120.

land at the time of the conveyance,(a) or at his option the consideration actually received by the defendant.(b) In Ontario, on the other hand, it has been held that the plaintiff may recover the consideration he actually paid.(c) It would seem that this case should be treated as if a deed with covenants had been given by the defendant to the third party, and another by the third party to the plaintiff.(d)

Covenants of Seizin and Right to Convey.

§ 966. **Consideration with interest and expenses recoverable.**—The covenants of seizin and of right to convey are, so far as the question of damages is involved, practically equivalent. In actions upon them it is not necessary, as in the case of the covenants of warranty and of quiet enjoyment, * to allege by way of breach an ouster or eviction. All that is requisite is to negative the words of the covenant.[1] If, at the time of the execution of the deed, the grantor does not own the land, the covenant is broken immediately.** If the covenant of seizin were treated as an ordinary contract, by analogy with the general principles of law, the value of the premises, at the time of the breach, would be the proper compensation, for, if the covenant were true, the vendee would have the premises. The covenant, as has been seen, is broken at the time of the conveyance; and the value of the land at the time of the conveyance would be the true measure of damages according to the ordinary principles govern-

[1] Rickert *v.* Snyder, 9 Wend. 416; 4 Kent. Com. 479.

(a) Byrnes *v.* Rich, 5 Gray 518.

(b) Staples *v.* Dean, 114 Mass. 125. This was held to be the true measure in Cook *v.* Curtis, 68 Mich. 611.

(c) Graham *v.* Leslie, 4 Up. Can. C. P. 176.

(d) See § 962.

ing the subject. But as the parties at that time agreed upon a fair value for the land, that value which is the consideration actually paid, is arbitrarily adopted as the measure or damages.(a)

Where the price paid cannot be discovered, the value of the land at the time of the sale must be proved, and may then be recovered.(b) And when lands were exchanged, and the defendant had no title to the land he conveyed, the value of the land conveyed by the plaintiff at the time of its conveyance is the measure, that having been agreed by the parties to be the value of the land conveyed by the defendant.(c) In Hodges *v.* Thayer,(d) which was an action on the covenant of seizin and right to convey, the consideration was the conveyance to a third party of real property belonging to the grantee and personal property belonging to the grantee's wife, and it was held that the measure of damages was the value of

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(a) Bibb *v.* Freeman, 59 Ala. 612; Logan *v.* Moulder, 1 Ark. 313, 323; Castle *v.* Peirce, 2 Root 294; Mitchell *v.* Hazen, 4 Conn. 495; Sterling *v.* Peet, 14 Conn. 245; Hartford & S. O. Co. *v.* Miller, 41 Conn. 112; Weber *v.* Anderson, 73 Ill. 439; Phillips *v.* Reichert, 17 Ind. 120; Wilson *v.* Peelle, 78 Ind. 384; Zent *v.* Picken, 54 Ia. 535; Cox *v.* Strode, 2 Bibb 273; Stubbs *v.* Page, 2 Me. 378; Montgomery *v.* Reed, 69 Me. 510; Marston *v.* Hobbs, 2 Mass. 433; Caswell *v.* Wendell, 4 Mass. 108; Nichols *v.* Walter, 8 Mass. 243; Jenkins *v.* Hopkins, 8 Pick. 346; Kimball *v.* Bryant, 25 Minn. 496; Herndon *v.* Harrisson, 34 Miss. 486; Tapley *v.* Lebeaume, 1 Mo. 550; Martin *v.* Long, 3 Mo. 391; Willson *v.* Willson, 25 N. H. 229; Nutting *v.* Herbert, 37 N. H. 346; Pitcher *v.* Livingston, 4 Johns. 1; Wilson *v.* Forbes, 2 Dev. 30; Backus *v.* McCoy, 3 Oh. 211; Clark *v.* Parr, 14 Oh. 118; Stark *v.* Olney, 3 Ore. 88; Weiting *v.* Nissley, 13 Pa. 650; Blossom *v.* Knox, 3 Chand. (Wis.) 295. In Bickford *v.* Page, 2 Mass. 455, 461, the court said: "The rule for assessing the damages arising from this breach is very clear. No land passing by the defendant's deed to the plaintiff, he has lost no land by the breach of this covenant; he has lost only the consideration which he paid for it. This he is entitled to recover back, with interest to this time."

(b) Smith *v.* Strong, 14 Pick. 128.

(c) Lacey *v.* Marnan, 37 Ind. 168.

(d) 110 Mass. 286.

this real property and personal property. The court said that the measure of damages was the consideration paid, and that Byrnes *v.* Rich,(a) rested on the ground that there the consideration could not be proved. The opinion continues: "It does not modify the rule, if the actual consideration was paid in other commodities than money, or even in other real estate. It only requires that the value of such other property be ascertained. Nor does it matter that the consideration is, in fact, paid or delivered to another person than the grantor; or that it is itself, before delivery, the property of another than the grantee, provided it is agreed upon between the grantor and the grantee as the consideration upon which the deed is given."

In Massachusetts this rule is said to be founded on the fact that the money paid for the conveyance was paid upon a consideration failed. "As no estate passed by the conveyance, the plaintiff could lose no estate by the breach of these covenants, and hath lost nothing, but the consideration which he paid for the intended purchase."[1] This explanation of the rule is no more satisfactory than the ordinary one—that the parties have agreed upon the consideration as a limit. It is true that no estate passed if the covenant of seizin is broken, and the plaintiff in one sense might be said to have lost no estate. So in the case of a failure to deliver a specific chattel, he might be said not to have lost the chattel. But his cause of action is the breach of the covenant, and the real measure of his loss is the value of the thing (the estate) which this was designed to assure him.

In Michigan it is said that where the grantee has been

[1] Parsons, C. J., in Marston *v.* Hobbs, 2 Mass. 433, 439.

(a) 5 Gray 518.

in possession under the deed, the damages should be less than the consideration.(a) In Illinois the recovery rests on a peculiar principle. The purchaser of land can, on discovering that the vendor has not a good right to convey (as that he has an estate *pour autre vie*), and *on tendering a reconveyance*, recover the purchase-money and interest, together with the amount of taxes paid, with deductions for all rents and profits which have been or could have been received, that is, the parties are put in the same position as if no sale had been made.(b) Here again all the ordinary rules are violated. The object of compensation is not to put the parties in the same position as if no contract had been made, but to put them as nearly as possible in the situation they would have occupied had it been performed.

In a Massachusetts case,(c) the plaintiff had agreed to purchase from a third party certain land, for which he was to give a policy of insurance and his note for $450. The third party not having the title, agreed with the defendant to purchase from him for $475. The defendant made out a deed to the plaintiff, with covenants of seizin and right to convey, receiving the plaintiff's note for $450 and $25 from the third party. It was held that the plaintiff could, at his option, recover either the fair market value of the land at the time of the sale, or the consideration actually received by the grantee. The plaintiff accepted his note, and $25 (the fair market value being about $575), Wells, J., saying: "To the extent of what he (the defendant) actually received, the plaintiff doubtless might hold him liable upon his covenant of seizin and title. But otherwise, the measure of

(a) Hunt *v.* Middlesworth, 44 Mich. 448.
(b) Frazer *v.* Supervisors of Peoria, 74 Ill. 282.
(c) Staples *v.* Dean, 114 Mass. 125.

his liability would be the actual value of the land at the time of the conveyance."

Covenants against Incumbrances.

§ 967. **General principles.**—* We proceed now to consider the rule in regard to the covenant against incumbrances. And on this subject the Supreme Court of Massachusetts has used this general language, that the defendant is to make good his warranty; that is, he is to pay a sum of money which will put the plaintiff in as good a state as if he had kept his covenant.[1] The cases arising under the covenant against incumbrances resolve themselves into three general heads: *First*, where the incumbrance consists of a mortgage or other debt which is already due and which the plaintiff has paid off. *Second*, where the plaintiff has not discharged the incumbrance, though it might have been done. *Third*, where the incumbrance consists of a mortgage or lease not expired, or servitude of any description, which the plaintiff cannot discharge. In Massachusetts, the general rule has been laid down as follows: "If the covenantee has fairly extinguished the incumbrances, he ought to recover the expenses necessarily incurred in doing it. If they remain and consist of mortgages, attachments, and such liens on the estate conveyed as do not interefere with the enjoyment of it by the covenantee, he can recover only nominal damages. But if they are of a permanent nature, such as the covenantee cannot remove, he should recover a just compensation for the real injury resulting from their continuance."[2] And this seems the law as generally received. So in New York[3] it was held,

[1] Thayer *v.* Clemence, 22 Pick. 490. 69; Batchelder *v.* Sturgis, 3 Cush.
[2] Harlow *v.* Thomas, 15 Pick. 66, 201.
[3] Delavergne *v.* Norris, 7 Johns. 358.

that if the plaintiff had actually extinguished the incumbrance, he was entitled to recover the amount so paid; but if not extinguished, that then he could only recover nominal damages; and the doctrine has been uniformly adhered to in that State.[1] And, on the same principle, in regard to the mode in which the breach of this covenant must be set out, it is held in New York[2] not to be sufficient to aver that the premises are not unincumbered, but that the plaintiff must allege the extinguishment of the incumbrance.

So in Massachusetts, in an early case, Parsons, C. J., said: "A purchaser from one seized is not obliged to wait in painful suspense until he be evicted, before he can obtain an adequate remedy; but as soon as he can extinguish the incumbrance, he may call on his grantor for an indemnity." So held again in the same State, that the damages in a suit on the covenant against incumbrances are merely nominal, if the plaintiff has paid nothing for their discharge.[3]**

§ 968. **Incumbrance removable.**—The covenant against incumbrances like those of seizin and right to convey is broken when the deed is delivered, if at that time there are any incumbrances.([a]) Where the covenant is broken by the existence of an incumbrance, such as a mortgage, which may be removed by the payment of money, the measure of damages is the amount of money necessary to remove it. And so where a mortgage has been foreclosed, but the time for redemption has not run out, the cost of redeeming from it is the measure of damages.([b]) In an action

[1] Hall *v.* Dean, 13 Johns. 105; Stanard *v.* Eldridge, 16 Johns. 254.
[2] Deforest *v.* Leete, 16 Johns. 122.
[3] Prescott *v.* Truman, 4 Mass. 627; Wyman *v.* Ballard 12 Mass. 303; Tufts *v.* Adams, 8 Pick. 547.

([a]) Harrington *v.* Murphy, 109 Mass. 299; Smith *v.* Lloyd, 29 Mich. 382; Post *v.* Campau, 42 Mich. 90; Stambaugh *v.* Smith, 23 Oh. St. 584.
([b]) Tufts *v.* Adams, 8 Pick. 547.

upon a covenant of warranty and quiet enjoyment, where the right of a prior mortgagee in possession existed at the time of the conveyance of the premises to the plaintiff, and the mortgagee could and did, by virtue of that right, resist the grantee's claim to the possession, it was held, by the Supreme Court of New York, at Special Term, that the covenant of warranty was broken, and that the measure of the grantee's damages was the amount due on the mortgage, with interest.(a)

In an action upon this covenant, the defendant may show that at the time of conveyance money was left in the plaintiff's hands to discharge the incumbrance.(b) There may be successive actions by the grantee as successive injuries occur as a consequence of the incumbrance.(c)

§ 969. **Total eviction.**—In the case of total eviction by reason of the incumbrance resulting in acquisition of a valid title in fee by the incumbrancer, the plaintiff recovers, in New York,[1] the consideration named in his deed, with interest, and also the costs of the proceeding in which he was evicted;(d) or, in Massachusetts,[2](e) the value of the land, with interest from the time of the eviction. If the incumbrance consists in an unexpired lease the measure of damages is the value of the use of the premises for the time during which grantee is deprived of their

[1] Waldo *v.* Long, 7 Johns. 173. [2] Barrett *v.* Porter, 14 Mass. 143.

(a) Winslow *v.* McCall, 32 Barb. 241.

(b) Blood *v.* Wilkins, 43 Ia. 565; Wachendorf *v.* Lancaster, 66 Ia. 458.

(c) Post *v.* Campau, 42 Mich. 90.

(d) *Accord.* Willets *v.* Burgess, 34 Ill. 494; Burton *v.* Reeds, 20 Ind. 87; Willson *v.* Willson, 25 N. H. 229, 235 (*semble*); Stewart *v.* Drake, 9 N. J. L. 139; Dimmick *v.* Lockwood, 10 Wend. 142; Greene *v.* Tallman, 20 N. Y. 191; Patterson *v.* Stewart, 6 W. & S. 527.

(e) But where there has been no eviction, only the consideration and interest: Chapel *v.* Bull, 17 Mass. 213; Jenkins *v.* Hopkins, 8 Pick. 346.

use.(a) * So in New York, where the plaintiff had been ousted of a portion of the premises by a third party, who had a superior title, but for a term of years only, it was held by the Supreme Court that the measure of damages was not the consideration money of the land of which the plaintiff was dispossessed and interest, but the annual value thereof, or the interest of the consideration money paid for the land for the period of the term; and that the costs and counsel fees of the plaintiff's defense to the termor's suit were all properly included.[1] **

§ 970. **Eviction from part of land.**—If the plaintiff's possession has been interfered with on account of the incumbrance, he recovers the amount of his injury, not exceeding the consideration or the value, as the case may be.(b) So in a case in Iowa,(c) where part of the land had been taken for a public use, it was held that the measure of damages was a sum which bore the same ratio to the consideration money that the market value of the land as depreciated by the incumbrance bore to the market value without the incumbrance.

* Where the eviction complained of is partial, the recovery is proportioned to the value of the part of the premises to which the title has failed. Where action was brought[2] on the covenant of seizin, the title to part of the premises having failed, it was insisted, on the authority of an English case,[3] that this partial failure of title gave the plaintiff a right to recover the entire purchase-money. But the court held otherwise: that it was com-

[1] Rickert *v.* Snyder, 9 Wend. 416 (covenant of seizin).

[2] Morris *v.* Phelps, 5 Johns. 49, recognized in Guthrie *v.* Pugsley, 12 Johns. 126.

[3] Farrar *v.* Nightingal, 2 Esp. 639.

(a) Fritz *v.* Pusey, 31 Minn. 368.

(b) Wright *v.* Nipple, 92 Ind. 310; Harlow *v.* Thomas, 15 Pick. 66, 69; Batchelder *v.* Sturgis, 3 Cush. 201; Porter *v.* Bradley, 7 R. I. 538.

(c) Kostendader *v.* Pierce, 37 Ia. 645; Koestenbader *v.* Peirce, 41 Ia. 204.

petent for the defendant to show that the part in regard to which the title had failed was of inferior quality to the other portion conveyed, and that the true measure of damage was the value of the part to which the title had failed, taken in proportion to the price of the whole; the whole computation being on the basis of the consideration money. This rule was deduced by Kent, C. J., from the Year-Books,[1] and enforced by the analogies of the civil law. "*Quod enim*," says Ulpian, "*si quod in agro pretiosissimum, hoc evictum est; aut quod fuit in agro vilissimum? æstimabitur loci qualitas, et sic ecrit regressus.*"[2] The same principle is also recognized by Pothier.[3] In a case in Massachusetts, it was contended that the damages should be determined by the proportion in quantity which the part to which the title had failed bore to the residue; but the court said: "This is not a just rule, for the value may be unequal. The true and just rule is, that the proportional *value*, and not the *quantity*, of the several parts of the land should be the measure of damages."[4] **

As the rule is usually stated, the measure of damages is such part of the original price as bears the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole tract conveyed; or in States adopting the New England rule, the actual value of the part from which the grantee has been evicted.([a]) In Boyle *v.* Edwards ([b]) the plain-

[1] Beauchamp *v.* Damory, 29 E. III, 3; 13 E. IV, 3. See, also, Gray *v.* Briscoe, Noy 142.

[2] Dig. 21, 21. 1, l. 13, and l. 64, § 3.

[3] Contrat de Vente, No. 99, 139, 142.

[4] Cornell *v.* Jackson, 3 Cush. 506; see, also, in Ohio, Michael *v.* Mills, 17 Oh. 601.

([a]) Griffin *v.* Reynolds, 17 How. 609; Walker *v.* Johnson, 13 Ark. 522; Hubbard *v.* Norton, 10 Conn. 422; Kerley *v.* Richardson, 17 Ga. 602; Major

([b]) 114 Mass. 378.

tiff had been evicted from an undivided one-third. There belonged to the premises a right to build upon a division wall. In an action for breach of warranty it was held that the value of that privilege could be taken into account in estimating the damage. When the title fails as to an undivided share of the granted land, the plaintiff recovers that proportion of the purchase-money, or, in New England, of the value.(a)

§ 971. **Partial failure of title.**—In the cases which we have just been considering there is an eviction from a part of the land. It often happens that, without any eviction, there is a partial failure of title, through an outstanding particular estate. Thus where there is an outstanding life estate or right of dower, the value of the estate outstanding is the measure of damages.(b) So where the

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v. Dunnavant, 25 Ill. 262; Tone *v.* Wilson, 81 Ill. 529; Wiley *v.* Howard, 15 Ind. 169; Phillips *v.* Reichert, 17 Ind. 120; Hoot *v.* Spade, 20 Ind. 326; Wright *v.* Nipple, 92 Ind. 310; Brandt *v.* Foster, 5 Ia. 287; McDunn *v.* Des Moines, 39 Ia. 286; Mischke *v.* Baughn, 52 Ia. 528; Hunt *v.* Orwig, 17 B. Mon. 73; Dalton *v.* Bowker, 8 Nev. 190; Winnepiseogee P. Co. *v.* Eaton, 18 Atl. Rep. 171 (N. H.); Furniss *v.* Ferguson, 15 N. Y. 437; Adams *v.* Conover, 22 Hun 424; Hunt *v.* Raplee, 44 Hun 149; Giles *v.* Dugro, 1 Duer 331; Dickens *v.* Shepperd, 3 Murph. 526; Price *v.* Deal, 90 N. C. 291; Nyce *v.* Obertz, 17 Oh. 71; Stark *v.* Olney, 3 Ore. 88; Beaupland *v.* McKeen, 28 Pa. 124; Wallace *v.* Talbot, 1 McCord 466; Whitzman *v.* Hirsh, 87 Tenn. 513; Raines *v.* Calloway, 27 Tex. 678; Nelson *v.* Matthews, 2 H. & M. 164; Humphreys *v.* McClenachan, 1 Munf. 493; Butcher *v.* Peterson, 26 W. Va. 447; Messer *v.* Oestreich, 52 Wis. 684; Bartelt *v.* Braunsdorf, 57 Wis. 1; Semple *v.* Whorton, 68 Wis. 626.

(a) Wright *v.* Nipple, 92 Ind. 310; Lucas *v.* Wilcox, 135 Mass. 77. A covenant was contained in a conveyance of two-thirds of a piece of real estate made by one who was seized in fee, subject to an outstanding right of dower. Held that the covenant of warranty was broken on the delivery of the deed, and if the part subsequently set off to the widow for her life exceeded in value one-third of the whole, the grantee would be entitled to damages equivalent to the proportionate diminution in value of the estate conveyed. If the part set off did not exceed one-third in value, the damages would be nominal only. Blanchard *v.* Blanchard, 48 Me. 174.

(b) Tierney *v.* Whiting, 2 Col. 620; Downie *v.* Ladd, 22 Neb. 531; Guth-

granted estate was a lease for 99 years, reserving rent, and there was a right of dower outstanding, the rent was abated one-third during the life of the dowress ([a]) And where the fee was granted, but only a life estate owned, the measure of damages was the difference in value of the life estate and the fee.([b])

§ 972. **Permanent incumbrance on the land.**—Where the land is subject to an incumbrance which cannot be removed by the payment of money, but the entire fee subject to it remains in the grantee, the measure of damages is the depreciation in value of the land by reason of the incumbrance. So in the case of an easement.([c]) So in Williamson *v.* Hall,([d]) where the incumbrance was a right of way owned by a railroad. It was held that the measure of damages was the injury resulting from the existence of the easement, excluding all consideration of the benefits or damage common to other land in the vicinity not occupied by the railroad. To the same effect is Kellogg *v.* Malin,([e]) where, however, it is intimated that, *prima facie*, it would be that proportion of the value which the land taken bore to the whole tract. In this case it appeared that the railroad company did not use its way to the extent of its whole

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rie *v.* Pugsley, 12 Johns. 126; Terry *v.* Drabenstadt, 68 Pa. 400; Mills *v.* Catlin, 22 Vt. 98; Stuart *v.* Mathieson, 23 Up. Can. Q. B. 135. In Welsh *v.* Kibler, 5 S. C. 405, an action for breach of covenant of quiet enjoyment, the breach being a recovery in lieu of dower, it was held that the measure of damages was the full amount of recovery, including rents and profits, interest, and the costs of suits.

([a]) McAlpin *v.* Woodruff, 11 Oh. St. 120.

([b]) Recohs *v.* Younglove, 8 Baxt. 385.

([c]) Hubbard *v.* Norton, 10 Conn. 422; Prescott *v.* Trueman, 4 Mass. 627; Bronson *v.* Coffin, 108 Mass. 175; Fritz *v.* Pusey, 31 Minn. 368; Mackey *v.* Harmon, 34 Minn. 168; Mohr *v.* Parmelee, 43 N. Y. Super. Ct. 320.

([d]) 62 Mo. 405.

([e]) 62 Mo. 429.

width, but permitted the plaintiff to cultivate the land not actually occupied by it. It was held that this was a matter between the company and the plaintiffs, and as the privilege might be withdrawn at any time, it did not affect the rule of damages. In Mitchell *v.* Stanley,(a) the defendants had conveyed to the plaintiffs, with a covenant against incumbrances, a tract of land on which there was an incumbrance in the shape of an easement, a third party having a right to pass and repass to make repairs on a canal. It was held that the plaintiff was not confined to the damage actually suffered before trial; that he could recover the diminution in value of the property by reason of the incumbrance.(b) In regard to the claim of the plaintiffs, that the only actual damage was that suffered before trial, the court said: "It is true that this is the only direct damage they have received from the exercise of the right of way. But is this the only actual damage? We think not. The incumbrance is permanent and perpetual, and the estate of the plaintiffs forever burdened with this servitude, which they have no power, as a matter of right, to remove, and which diminishes the value of their land to the amount of $750."(c) So where an easement —for instance, a party wall—is found not to lessen the value of the land, the damage is nominal.(d) As in case of an easement, so where the incumbrance is an inchoate right of dower, the measure of damages is the depreciation in value of the land by reason of the incumbrance.(e)

In Alabama, where the breach consists of an incum-

(a) 44 Conn. 312, 317.
(b) *Acc.* Clark *v.* Zeigler, 79 Ala. 346; 85 Ala. 154.
(c) See Porter *v.* Bradley, 7 R. I. 538.
(d) Mackey *v.* Harmon, 34 Minn. 168.
(e) Brisbane *v.* Pomeroy, 13 Daly 358.

brance on a portion of the tract, the measure of damages is the diminished value of the entire tract, not exceeding the entire purchase-money paid, with interest.(a) But in North Carolina, the value of that part only of the whole tract upon which the incumbrance rests is the limit of recovery.(b) This would depend, it would seem, upon whether the unincumbered portion of the tract could be enjoyed as well with the incumbrance as without it.

§ 973. **Improvements.**—* In New York, the following question was raised.[1] Suit was brought on the covenant against incumbrances; the declaration averred that the plaintiff purchased the land in question for two hundred and fifty dollars, and put on improvements to the value of two thousand dollars; that at the time of the deed, the premises were not free from incumbrances, but that they were subject to a judgment for upward of three thousand dollars on an undivided moiety of the lot, under which incumbrance one-half was sold. Plea, that the plaintiff was only entitled to recover one hundred and twenty-five dollars, one-half of the consideration money paid, and tender of that sum; demurrer and joinder.

This plea proceeded on the ground that under the covenant against incumbrances, the plaintiff can only recover the consideration paid, and nothing for his improvements. So the court held, and gave judgment for the defendant. It was even intimated that if he had discharged the incumbrance, he could not recover the amount paid. "Suppose the plaintiff," said Savage,

[1] Dimmick *v.* Lockwood, 10 Wend. 142, 154.

(a) Clark *v.* Zeigler, 79 Ala. 346.

(b) Price *v.* Deal, 90 N. C. 291; *acc.* Kostendader *v.* Pierce, 37 Ia. 645; Koestenbader *v.* Peirce, 41 Ia. 204.

C. J., "instead of building a house, had paid the $3,000, and brought his suit to be reimbursed, he would bring himself within the language of some of the judges who say that a purchaser is entitled to recover what he has paid ; and yet I apprehend he would not be permitted to recover that amount." The court laid stress on the admitted fact, that under the covenant of quiet enjoyment, only the consideration money and interest could be recovered, and asked why more should be obtained in the action before them.

This case appears open to much observation : it may not be contrary to the spirit of the rule in regard to the covenant for quiet enjoyment; but if generally applied, it appears greatly to diminish the value of the covenant against incumbrances. By surrendering the property to the previous incumbrancer, a valid claim may always be created to the extent of the consideration money, and to this it seems the recovery under this covenant is in every instance to be limited. A case may, however, easily be imagined, where the incumbrance is well known, where the consideration money is a fair representative of the value without the incumbrance, where the grantor agrees to remove it, and the covenant against incumbrances is inserted for the express purpose of making it certain that he will do so. In such a case the application of this principle would be extremely inequitable. For it must not be forgotten that the severity of the arbitrary rule which declares the consideration named in the deed to be the actual price paid, is but little mitigated by the permission given to the parties to contradict it by parol proof. Such evidence, after the lapse of a few years, will generally be difficult of production, in many cases impossible, and the mere burden of proof is always a serious responsibility. In Massa-

chusetts, also, it has been said that the general rule that the covenantor against incumbrances is liable to refund the sum paid by the grantee to extinguish the incumbrance, must be taken subject to the qualification that the amount thus paid does not exceed that which the grantor would be bound to pay in case of eviction. In other words, he cannot be made liable for more than the value of the estate. But it will be observed, that where the value is fixed by the consideration money paid, as in New York, the rule becomes a very different one in its effect from what it is where the actual value at the time of eviction is taken, as in Massachusetts. In this latter case there appears no objection to it.[1]

In Massachusetts, in an action on the covenant against incumbrances, and of warranty,[2] there was proved a deed by defendants to plaintiffs; that in the conveyance to the defendants, the land was supposed to be embraced, but it was not; that subsequent to the conveyance by defendants to plaintiffs, the original owners entered, and the plaintiff surrendered, and afterwards paid divers sums to extinguish the original title. The plaintiffs claimed the sums paid to extinguish the adverse titles, with charges for their time spent in extinguishing them, incidental expense for horse and carriage hire, and sums paid for advice of counsel after suit brought. The latter item (*counsel fees*) was disallowed; but the other expenses, subsequent to the service of the writ, were allowed.**

§ 974. **Consequential damages not allowed.**—In New York it has been said that, in the absence of fraud, in an action brought by a grantee of land against his grantor for a breach of covenant against incumbrances, the measure of damages is the actual amount or value of the in-

[1] Norton *v.* Babcock, 2 Met. 510, 516. [2] Leffingwell *v.* Elliott, 10 Pick. 204.

cumbrance, and where the purchaser has not enjoyed the premises, the interest, no consequential damages being allowed. "The reason given is that when the incumbrance is actually unknown to the vendor, as is generally the case where he covenants against them, the means of discovering them are, or with proper exertions may be, equally accessible to both parties. If the intended purchaser should make proper examination, he would ordinarily discover an incumbrance, which must be in writing, and the evidence on record; and should he neglect to do that, he cannot reasonably claim more than an exemption from positive loss." (a) So, in Massachusetts, it was said in an early case[1] that the effect of an unexpired lease "*on the sale of the estate* could not be taken as the true rule; that such effect must in its very nature be imaginary, and supported only by speculative opinions and conjectures"; and that "it was quite too loose and uncertain a mode of estimating damages." Nor will, in such a case, the fact that the estate was purchased by the grantee for resale, be allowed to be proved in order to augment the damages, unless this was known to the grantor. In Harrington *v.* Murphy (b) the plaintiff discovered an incumbrance in the shape of an inchoate right of dower. He sold the land at auction, but the purchaser refused it on this account. It was held that the plaintiff could not recover the expenses of the auctioneer in that sale, they being "too remote and indirect."

§ 975. **Covenant to remove incumbrances.**—* Instead of the general covenant that the premises conveyed are free from incumbrances, we sometimes find a special agree-

[1] Batchelder *v.* Sturgis, 3 Cush. 201.

(a) Greene *v.* Tallman, 20 N. Y. 191, 196, *per* Strong, J. *Acc.* Claycomb *v.* Munger, 51 Ill. 373; Greene *v.* Creighton, 7 R. I. 1.

(b) 109 Mass. 299.

ment to remove certain existing incumbrances; and in such a case in England it was early held that the amount of the incumbrance becomes the measure of damages. In an action by the trustees of the defendant's wife on a covenant to pay off certain incumbrances to the amount of £19,000, no special damage was laid in the declaration, nor proved, and judgment having gone by default, the sheriff's jury gave only nominal damages; but, on motion, the inquisition was set aside; Lord Tenterden, C. J., saying, "If the plaintiffs are only to recover a shilling damages, the covenant becomes of no value"; and Parke, J., said, "At law the trustees were entitled to have this estate unincumbered. How could that be enforced unless they could recover the whole amount of the incumbrances, in an action on the covenant?"[1] **

This rule has been generally adopted in this country, the reason of it being that the covenant to remove the incumbrance is assumed to be covered by the consideration paid for the land; or in other words, the value of the land in the plaintiff's hands is diminished by the amount of the incumbrance. Accordingly, where the vendor agrees to pay all claims against the lot sold, it is not necessary for the purchaser to prove that a judgment which is a lien upon the premises has been enforced, or that he has been evicted. The non-payment of the judgment is all that is necessary in order to show a breach; and the rule of damages upon a breach is the amount of the judgment with interest.(a) In an action for damages for breach of a covenant to pay all such taxes and assessments as should be imposed during the term of the lease, it was held by the Superior Court of

[1] Lethbridge *v.* Mytton, 2 B. & A. 772.

(a) Cady *v.* Allen, 22 Barb. 388.

New York that nominal damages only could be recovered for the non-payment of an assessment, where the plaintiff had not actually paid it. But this judgment was reversed by the Commission of Appeals, which held that the covenant was not one for indemnity merely, and that the plaintiffs were entitled to judgment for the amount due on the assessment.(a) In Indiana, on the breach of a contract to remove incumbrances, the measure of the recovery is now held, in reversal of previous decisions in that State,(b) to be the amount due on the incumbrance, notwithstanding the grantee had neither paid it nor been evicted.(c) So where premises are conveyed subject to a mortgage, which the grantee assumes and agrees to pay, the grantor upon non-payment of the mortgage when due may recover the amount of it, though he has been obliged to pay nothing.(d) And if the premises are sold on foreclosure, leaving a balance due, the grantor may recover the amount of that balance though he has been called upon to pay nothing.(e) But if the whole debt has been satisfied out of the land, the grantor can recover only nominal damages.(f)

This follows from the rule established in the case of contracts to pay the debt of another, discussed in a former chapter,(g) namely, that the amount of the debt may be

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(a) Trinity Church *v.* Higgins, 4 Rob. 372; 48 N. Y. 532.

(b) Schooley *v.* Stoops, 4 Ind. 130; Tate *v.* Booe, 9 Ind. 13.

(c) Johnson *v.* Britton, 23 Ind. 105. The decision was based in part on the provisions of the Code of Procedure, under which courts of law have equity jurisdiction, the distinction between actions at law and suits in equity is abolished, and all having an interest in a controversy may be made parties to the suit.

(d) Furnas *v.* Durgin, 119 Mass. 500; Reed *v.* Paul, 131 Mass. 129; Williams *v.* Fowle, 132 Mass. 385; Seligman *v.* Dudley, 14 Hun 186.

(e) Locke *v.* Homer, 131 Mass. 93.

(f) Muhlig *v.* Fiske, 131 Mass. 110.

(g) § 789.

recovered by the original debtor, whether or not he has been called upon to pay it. The result might be that the land would still be subject to the mortgage, though the amount of it had been recovered by the grantor. But this result may always be avoided by the grantee discharging the incumbrance on suit being brought. But recovery in Iowa is limited to nominal damages.(a) When the land is lost through the foreclosure of the incumbrance, the value of the land is usually the measure of recovery.(b) In a case in Ohio, the plaintiff, after exchanging with the principal defendant certain lands in Ohio for lands in Indiana, discovered that the Indiana land was subject to an attachment levied by the creditors of the defendant, who thereupon executed and delivered to the plaintiff a written undertaking to cancel all incumbrances on the Indiana land within six months. The Indiana land having been sold in the attachment suit, the plaintiff was held entitled to recover its value when lost, with interest from that time.(c) In Illinois in such a case the measure of damages was said to be the consideration.(d) Where a covenant was given by a grantee to pay, or allow in account, a certain sum, provided certain incumbrances were removed by the grantor by a given day, and they were removed, but not till a year afterwards, it was held that such deduction must be made from the sum to be allowed to the grantor as any change that had in the interim taken place in the value of the property might render just and proper.[1] In Pennsylvania it has been held,[2] that if a vendee covenant to pay

[1] Roberts *v.* Marston, 20 Me. 275. [2] Young *v.* Stone, 4 Watts & Serg. 45.

(a) Linder *v.* Lake, 6 Iowa 164; Funk *v.* Creswell, 5 Iowa 62.
(b) Blood *v.* Wilkins, 43 Ia. 565.
(c) Manahan *v.* Smith, 19 Ohio St. 384.
(d) Howell *v.* Moores, 127 Ill. 67.

an incumbrance out of the purchase-money, and fail to do so, by reason of which the land is sold for the payment of the incumbrance before conveyance and sells for a price exceeding the incumbrance, the vendee is liable to the vendor for damages, the measure of which is the difference between the amount for which the land is sold, and the price which he agreed to pay for it. Since the vendor had received the balance upon the sale to satisfy the incumbrance, this was a recovery of the difference between what the defendant was to pay and what the plaintiff actually received; in other words, the value of the bargain. But on failure to take up a lien on a tract of land the measure of damages has been held in Texas to be limited to the amount of the lien.([a])

General Principles.

§ 976. Nominal damages.—Having now examined the peculiar rules adopted by the courts in the case of the common covenants for title, we proceed to consider the general principles applicable in all cases of breach of such covenants. If there has been no eviction, and the plaintiff's possession has not been interfered with, the plaintiff can recover only nominal damages; ([b]) the prin-

([a]) Thomas *v.* Hammond, 47 Tex. 42.

([b]) Davis *v.* Lyman, 6 Conn. 249, 255 (*semble*); Briggs *v.* Morse, 42 Conn. 258; Brady *v.* Spurck, 27 Ill. 478; Willets *v.* Burgess, 34 Ill. 494; Whisler *v.* Hicks, 5 Blackf. 100 (*semble*); Smith *v.* Ackerman, 5 Blackf. 541; Pomeroy *v.* Burnett, 8 Blackf. 142; Small *v.* Reeves, 14 Ind. 163; Hacker *v.* Blake, 17 Ind. 97; Bundy *v.* Ridenour, 63 Ind. 406; Jones *v.* Noe, 71 Ind. 368; Marsh *v.* Thompson, 102 Ind. 272; Boon *v.* McHenry, 55 Ia. 202; Wilson *v.* Irish, 62 Ia. 260; Hencke *v.* Johnson, 62 Ia. 555; Norman *v.* Winch, 65 Ia. 263; Scoffins *v.* Grandstaff, 12 Kas. 467; Bean *v.* Mayo, 5 Me. 94; Randell *v.* Mallett, 14 Me. 51; Stowell *v.* Bennett, 34 Me. 422; Reed *v.* Pierce, 36 Me. 455; Prescott *v.* Trueman, 4 Mass. 627; Wyman *v.* Ballard, 12 Mass. 304; Leffingwell *v.* Elliott, 8 Pick. 455; Tufts *v.* Adams, 8 Pick. 547; Harrington *v.* Murphy, 109 Mass. 299; Wilcox *v.* Musche, 39 Mich.

ciple being that until interference with possession the existence of the incumbrance is a mere hypothetical injury. So in Runnells *v.* Webber (a) it was held that the fact that a right of dower existed in favor of the grantor's wife, gave a right only to nominal damages. In an action on a note given as the purchase-money for land, the defendant cannot set up in recoupment a breach of the covenant against incumbrances, where he has not paid off the incumbrance nor been evicted.(b) So no intermediate covenantee can sue his covenator till he himself has been compelled to pay damages upon his own warranty.(c) But a release of land without warranty to a third person has been held, in Massachusetts, not to prevent a grantee from recovering full damages against his grantor for a breach of the covenant of seizin.[1] It has been held, however, where the incumbrance cannot be removed by paying off the value of it, that the purchaser may be allowed substantial damages although not evicted. Where, in the conveyance of a strip of land to a railroad corporation, the grantor covenanted to maintain a fence along that part of the railroad which ran through

[1] Cornell *v.* Jackson, 3 Cush. 506.

101; Norton *v.* Colgrove, 41 Mich. 544; Ogden *v.* Ball, 38 Minn. 237; Collier *v.* Gamble, 10 Mo. 467; Dickson *v.* Desire, 23 Mo. 151; Kellogg *v.* Malin, 62 Mo. 429 (*semble*); Cockrell *v.* Proctor, 65 Mo. 41; Conklin *v.* Hannibal & S. J. R.R. Co., 65 Mo. 533; Willson *v.* Willson, 25 N. H. 229; Stewart *v.* Drake, 9 N. J. L. 139 (*semble*); Delavergne *v.* Norris, 7 Johns. 358; Hall *v.* Dean, 13 Johns. 105; Stanard *v.* Eldridge, 16 Johns. 254; Greene *v.* Tallman (indexed Grant *v.* Tallman), 20 N. Y. 191, Giles *v.* Dugro, 1 Duer 331; Wilson *v.* Forbes, 2 Dev. 30; Lane *v.* Richardson, 104 N. C. 642; Stambaugh *v.* Smith, 23 Oh. St. 584; Denson *v.* Love, 58 Tex. 468; Richardson *v.* Dorr, 5 Vt. 9, 20; Rosenberger *v.* Keller, 33 Gratt. 489; Pillsbury *v.* Mitchell, 5 Wis. 17; Eaton *v.* Lyman, 30 Wis. 41.

(a) 59 Me. 488.

(b) Cheney *v.* City Nat. Bank, 77 Ill. 562.

(c) Burt *v.* Dewey, 40 N. Y. 283; Sweet *v.* Bradley, 24 Barb. 549.

his farm, this constituted an incumbrance on his land adjoining the railroad; and the measure of damages for a breach of a covenant against incumbrances in a subsequent conveyance of such land was the difference in the fair market value of the estate by reason of the incumbrance, taking into consideration the expense of the fencing, so far only as it exceeded the cost of maintaining any fence which would reasonably have been required to prevent the straying of persons or cattle upon or from those lands if no agreement had been made.(a)

*A grantee can recover nothing more than the nominal damages for a breach of covenant by an incumbrance no longer existing, and not removed at his expense.[1] ** Such nominal damages are recoverable although the incumbrances are removed by the grantor before the suit is brought.(b) In Newcomb *v.* Wallace (c) the amount of a certain tax had been deducted from the consideration money at the request of the grantee, and one F., for whose benefit the plaintiff brought the action, had agreed to pay the taxes. The court held that the plaintiff could only recover nominal damages.

§ 977. **Mortgages.**—An exception has been made in some States in the case of a mortgage on the ground that the mortgage is a lien which may be satisfied out of the land. It has been held that where land is incumbered by an outstanding mortgage the measure of damages is the amount of the mortgage,(d) if that is less

[1] Herrick *v.* Moore, 19 Me. 313.

(a) Bronson *v.* Coffin, 108 Mass. 175.

(b) Smith *v.* Jefts, 44 N. H. 482. (c) 112 Mass.25.

(d) Tufts *v.* Adams, 8 Pick. 547; White *v.* Whitney, 3 Met. 81; Funk *v.* Voneida, 11 S. & R. 109; Empire G. M. Co. *v.* Jones, 19 Up. Can. C. P. 245. This is true, though the mortgage includes other lands which are worth more than the amount of the mortgage: Connell *v.* Boulton, 25 Up. Can. Q. B. 444.

than the value of the land (a) or the consideration,(b) according to the rule adopted on covenants of warranty. But in other States no distinction is made between a mortgage and any other incumbrance; and so long as the mortgage is not foreclosed nor the plaintiff's possession disturbed he is allowed only nominal damages.(c)

§ 978. **After-acquired title—Estoppel—Reduction of damages.**—The subsequent acquisition of title by the grantor, even after suit brought,(d) reduces the damages to the extent of the title so acquired.(e) "The covenant was intended to secure to the plaintiff a legal seizin in the land conveyed. If it is broken, and he fails of that seizin, he has a right to reclaim the purchase-money. But if, in virtue of another covenant in the same deed, which was also taken to assure to him the subject-matter of the conveyance, he has obtained that seizin, it would be altogether inequitable that he should have the seizin, and be allowed besides to recover back the consideration paid for it."[1] If the plaintiff "takes anything by his deed, directly or indirectly, by its own force, or by its co-operation with other instruments or other circumstances, whether it be the entire thing purchased or a part of it, its value must be considered in estimating the damages."(f)

[1] Baxter *v.* Bradbury, 20 Me. 260, See also Whiting *v.* Dewey, 15 Pick. 263; Cornell *v.* Jackson, 3 Cush. 506 428.

(a) Furnas *v.* Durgin, 119 Mass. 500.

(b) Gibson *v.* Boulton, 3 Up. Can. C. P. 407.

(c) Bundy *v.* Ridenour, 63 Ind. 406; Randell *v.* Mallett, 14 Me. 51.

(d) King *v.* Gilson, 32 Ill. 348.

(e) Overhiser *v.* McCollister, 10 Ind. 41; Boon *v.* McHenry, 55 Ia. 202.

(f) Carpenter, J., in Hartford & Salisbury Ore Co. *v.* Miller, 41 Conn. 112, 130, where the deed by its terms conveyed certain mineral rights which the defendant in fact could not convey, not having the consent of his co-tenants. Afterwards, however, they assented, so that the plaintiffs acquired the same rights which he should have secured by the original deed. It was held that only nominal damages could be recovered.

§ 979. Title perfected by grantee—Expenses recoverable. —Where the grantee has perfected the title, either by buying in the paramount title or by securing the release of an incumbrance, he may, on the principles discussed elsewhere, recover the reasonable and necessary expense of so doing.(a) "If the covenantee has fairly extinguished the incumbrances, he is entitled to recover the price he has paid for it."[1] So in an action on a promissory note given for the purchase-money, it was held that the defendant could recoup a tax he had paid, the plaintiff being liable on his covenant against

[1] Delavergne *v.* Norris, 7 Johns. 358.

(a) Smith *v.* Compton, 3 B. & A. 407; Cane *v.* Allen, 2 Dow 289, 296; Lewis *v.* Harris, 31 Ala. 689; Collier *v.* Cowger, 12 S. W. Rep. 702 (Ark.); McGary *v.* Hastings, 39 Cal. 360; Davis *v.* Lyman, 6 Conn. 249, 254 (*semble*); Amos *v.* Cosby, 74 Ga. 793; Clapp *v.* Herdman, 25 Ill. App. 509; Whisler *v.* Hicks, 5 Blackf. 100 (*semble*); Brandt *v.* Foster, 5 Ia. 287; Fawcett *v.* Woods, 5 Ia. 400; Baker *v.* Corbett, 28 Ia. 317; Richards *v.* Iowa H. Co., 44 Ia. 304; Snell *v.* Iowa H. Co., 59 Ia. 701; Royer *v.* Foster, 62 Ia. 321; Dale *v.* Shively, 8 Kas. 276; McKee *v.* Bain, 11 Kas. 569; Spring *v.* Chase, 22 Me. 505; Reed *v.* Pierce, 36 Me. 455; Wyman *v.* Brigden, 4 Mass. 150; Harlow *v.* Thomas, 15 Pick. 66, 69; Thayer *v.* Clemence, 22 Pick. 490; Comings *v.* Little, 24 Pick. 266; Batchelder *v.* Sturgis, 3 Cush. 201; Smith *v.* Carney, 127 Mass. 179; Long *v.* Sinclair, 40 Mich. 569; Kimball *v.* Bryant, 25 Minn. 496; Henderson *v.* Henderson, 13 Mo. 151; Lawless *v.* Collier, 19 Mo. 480; St. Louis *v.* Bissell, 46 Mo. 157; Ward *v.* Ashbrook, 78 Mo. 515; Willson *v.* Willson, 25 N. H. 229, 235 (*semble*); Stewart *v.* Drake, 9 N. J. L. 139 (*semble*); Hartshorn *v.* Cleveland, 19 Atl. Rep. 974 (N. J.); Andrews *v.* Appel, 22 Hun 429; Petrie *v.* Folz, 54 N. Y. Super. Ct. 223; Price *v.* Deal, 90 N. C. 290; Arrigoni *v.* Johnson, 6 Ore. 167; Porter *v.* Bradley, 7 R. I. 538; Jeter *v.* Glenn, 9 Rich. L. 374; Denson *v.* Love, 58 Tex. 468; Turner *v.* Goodrich, 26 Vt. 707; Cole *v.* Kimball, 52 Vt. 639; Hurd *v.* Hall, 12 Wis. 112; Bailey *v.* Scott, 13 Wis. 618; Eaton *v.* Tallmadge, 22 Wis. 526. Although the incumbrance bought in was a mortgage not yet due: Snyder *v.* Lane, 10 Ind. 424; Funk *v.* Voneida, 11 S. & R. 109. But if the plaintiff was actually evicted by the owner of the paramount title, and thereafter purchased the estate from him, the amount then paid will not limit recovery. Martin *v.* Atkinson, 7 Ga. 228; Boyer *v.* Amet, 6 So. Rep. 734 (La); Long *v.* Sinclair, 40 Mich. 569.

incumbrances.(a) In Stambaugh *v.* Smith,(b) the court said, that where the damages are the expenses incurred in removing the incumbrance, "the covenantee must show that the legal title to the outstanding estate has been extinguished, so that the covenantor may not be again prosecuted on account of some defect in the warranted title in some other covenant of the deed, after the eviction of a subsequent grantee of the estate at the suit of an innocent purchaser of the outstanding title." In an action for breach of a covenant of warranty on eviction under a mortgage, it was held that the plaintiff, having paid the mortgage before judgment, might recover the whole amount of it, although he had previously conveyed the estate to one who assumed, as a part of the consideration of that conveyance, to pay part of the mortgage.(c)

The extinguishment of the incumbrance need not have taken place before bringing the action,(d) *on the correct ground, that since the cause of action accrued before the commencement of the suit, by reason of the existence of the incumbrance, and thus a claim for nominal damages was created, the payment of the incumbrance was mere matter of consequence, which the jury should take into consideration.**

The recovery, of course, cannot exceed the amount actually paid by way of extinguishment, with interest.(e)

(a) Davis *v.* Bean, 114 Mass. 358. In Braman *v.* Bingham, 26 N. Y. 483, a grantor covenanted that there were incumbrances on the estate to the extent of $12,400 only. They amounted, in fact, to $12,800. The grantee, having paid a portion of them to an amount exceeding $400, was held entitled to recover that sum only.

(b) 23 Oh. St. 584.

(c) Estabrook *v.* Smith, 6 Gray 572.

(d) Kelly *v.* Low, 18 Me. 244; Leffingwell *v.* Elliott, 10 Pick. 204; Brooks *v.* Moody, 20 Pick. 474.

(e) Knadler *v.* Sharp, 36 Ia. 232. Thus the plaintiff can recover only $100,

Nor can the amount of the recovery exceed the purchase-money and interest, or, in New England, the value of the land.(a) But in extinguishing an incumbrance upon a part of the land it would seem that the plaintiff is not restricted to a proportional part of the purchase-money. Thus, in extinguishing a right of dower the plaintiff may expend more than one-third of the purchase-money and be reimbursed for it.(b)

In a peculiar case, where one who held a paramount title to land, having recovered the land against the grantee of another, had sold and conveyed it to the latter for a specified sum of money, in lieu of the payment of which the grantee executed to the other an assignment of his right of action against his grantor on the covenants in the latter's deed to him, this assignment was held equivalent to the payment of the specified sum; and the measure of the damages of the holder of the paramount title, in his action against his assignor's grantor for the breach of these covenants, was the same that the original grantee's would have been, namely, the consideration named in his original grantor's deed and interest, subject to the limitation that the assignee could recover no more than the consideration or price agreed between him and the original grantee.(c)

§ 980. **Expenses must be reasonable.**—The recovery will extend only to the expense of acts reasonably done, and

where he has bought up a mortgage of $300 for that amount. McDowell *v.* Milroy, 69 Ill. 498.

(a) McGary *v.* Hastings, 39 Cal. 369; Kelsey *v.* Remer, 43 Conn. 129; Brady *v.* Spurck, 27 Ill. 478, 482 (*semble*); Willets *v.* Burgess, 34 Ill. 494; Richards *v.* Iowa H. Co., 44 Ia. 304; Norton *v.* Babcock, 2 Met. 510, 516; Johnson *v.* Collins, 116 Mass. 392; Willson *v.* Willson, 25 N. H. 229 (*semble*); Dimmick *v.* Lockwood, 10 Wend. 149; Greene *v.* Tallman, 20 N. Y. 191; Andrews *v.* Appel, 22 Hun 429; Cox *v.* Henry, 32 Pa. 18; Porter *v.* Bradley, 7 R. I. 538.

(b) Walker *v.* Deaver, 79 Mo. 664.

(c) Eaton *v.* Lyman, 24 Wis. 438; 26 Wis. 61.

to the amount reasonably paid; and the burden is on the plaintiff to show that the sum paid to remove the incumbrance or to extinguish the paramount title was a reasonable one.(a) In Kelsey *v.* Remer (b) there had been an attachment on land. The attaching creditor secured a judgment, but levied his execution improperly. The plaintiff paid off the judgment in good faith, believing, and having reason to believe, that otherwise execution would issue. It was held that he acted with reasonable prudence and care in regard to the interests of the defendant, and that the amount paid should be the measure of damages. Park, C. J., said: "We think, in cases where judgment has been rendered in the suit in favor of the attaching creditor, and the owner of the land has conducted in good faith toward his covenantor, in paying the amount of the judgment, in order to free his land from the lien created by the attachment, the amount of the judgment should be the measure of damages if the amount is less than the value of the land attached; but if greater than such value, then the value of the land attached should be the measure of damages."(c)

§ 981. **Interest.**—The rules for the allowance of interest rest upon the following considerations. The damages are assessed as of the time of loss, and upon the general principles already discussed, interest should be added from that time in order to give complete indemnity. If the grantee is accountable for mesne profits from the time he

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(a) Anderson *v.* Knox, 20 Ala. 156; Pate *v.* Mitchell, 23 Ark. 590; Brandt *v.* Foster, 5 Ia. 287; Guthrie *v.* Russell, 46 Ia. 269; Walker *v.* Deaver, 5 Mo. App. 139.

(b) 43 Conn. 129, 139.

(c) So in case of a sewer assessment which was invalid, while the lien itself remained valid. Coburn *v.* Litchfield, 132 Mass. 449. So of an assessment for street improvement: Hartshorn *v.* Cleveland, 19 Atl. Rep. 974 (N. J.).

entered upon the land, it is because he is to be treated as a trespasser from that time, and not as having held the land under the conveyance: consequently the loss under the covenant happened at the time of the conveyance, and interest is to be recovered from that time. But if he is accountable for mesne profits only from a later time, or not at all, the conveyance practically secured him the land, and his loss happened only at the time when he became accountable for mesne profits. The damages therefore are assessed as of that time, and interest runs only from that time.

* In Staats *v.* Ten Eyck[1] it was said that the interest allowed should be commensurate with the legal claim to mesne profits. And in an action[2] brought by executors for a breach of the covenant of seizin, a verdict was taken by consent for the plaintiffs, for the consideration money expressed in the deed, with interest from the date to the time of trial; but it appearing that the premises had been actually enjoyed, and the mesne profits taken by the grantee, they were only allowed six years' interest, and a deduction was accordingly made. The principle of these decisions was affirmed in a subsequent case,[3] where in an action of covenant, an eviction being proved, the plaintiff was only allowed to recover the consideration paid, interest for six years thereon, and the costs of the eviction suit.** So in the same State, in an action for breach of the covenant of seizin,(a) it appeared that there was only a partial failure; the grantors having the fee in two-sixths of the premises conveyed, and a life estate in the remainder. The court said that interest ought not to be allowed during their lives, "for no one, during that

[1] 3 Caines 111.
[2] Bennet *v.* Jenkins, 13 Johns. 50.
[3] Caulkins *v.* Harris, 9 Johns. 324.

(a) Guthrie *v.* Pugsley, 12 Johns. 126.

time, will have a right to turn the plaintiff out of possession, or call on him for the mesne profits."

So in Ohio, * in an action on a covenant of warranty of title,[1] where the plaintiff had occupied the premises from the date of the conveyance, the enjoyment was declared to be equivalent to the interest upon the consideration, and no interest as such recoverable. But as the plaintiff might be compelled to account for rents and profits for *four years*, to the true owner, he was held entitled to recover *interest* for four years in the suit on the covenant.([a])** The principles laid down in these cases have been followed. Interest is usually allowed, whether the recovery is for eviction, or for the amount of expenditure in preventing eviction.([b]) Where, however, the plaintiff has been in possession, the enjoyment of the land is regarded as equivalent to interest upon the consideration, and no interest is in such case recoverable ([c]) unless he is accountable to the owner for mesne profits. If he is accountable for mesne profits, he is entitled to interest though he has been in possession.([d]) In a case in Maine[2] it was urged that the plaintiff derived no rents or profits from

[1] Clark *v.* Parr, 14 Oh. 118.

[2] Spring *v.* Chase, 22 Me. 505, 510.

([a]) *Acc.* Wade *v.* Comstock, 11 Oh. St. 71.

([b]) See all the authorities cited as supporting the general rules; and Martin *v.* Gordon, 24 Ga. 533; Burk *v.* Clements, 16 Ind. 132; Wood *v.* Bibbins, 58 Ind. 392; Shorthill *v.* Ferguson, 44 Ia. 249; Lawless *v.* Collier, 19 Mo. 480; Caulkins *v.* Harris, 9 Johns. 324; Greene *v.* Tallman, 20 N. Y. 191; Flint *v.* Steadman, 36 Vt. 210; Messer *v.* Oestreich, 52 Wis. 684.

([c]) Harding *v.* Larkin, 41 Ill. 413; Hutchins *v.* Roundtree, 77 Mo. 500; Flint *v.* Steadman, 36 Vt. 210; Click *v.* Green, 77 Va. 827; Sheffey *v.* Gardiner, 79 Va. 313. But in Connecticut the rule in the case of covenants of seizin is the same whether the grantee has been in possession or not, on the ground that the money due for rents and profits has no relation to the covenant broken, but constitutes a separate debt. Mitchell *v.* Hazen, 4 Conn. 495. This is entirely opposed to the current of authority.

([d]) Cox *v.* Henry, 32 Pa. 18.

the premises; but the court said: "We think that cannot be taken into consideration to affect the rights of the parties. If a person purchases real estate, it is to be presumed that he does so because the rents and profits of it will be equivalent to the interest of the money he may be content to pay for it. Whether the vendee turns his purchase to a profit or not, is no concern of the vendors."[1]

§ 982. Expense of defending or of obtaining possession.— The legal costs ([a]) and other necessary expenses of defending or of attempting to obtain possession of the property are recoverable by the grantee.([b]) In case an action was brought or defended, it must appear that this

[1] Thus where the defendant, being tenant for life, with remainder over, conveyed with covenant of seizin in fee, in a suit on this covenant, the plaintiff having been in possession from the time of the conveyance, was allowed to recover the consideration money without interest, deducting therefrom the value of the life estate. Tanner *v.* Livingston, 12 Wend. 83. In Spring *v.* Chase, 22 Me. 505, it is said, speaking of this case, "to have been held," that interest was not recoverable. But there was no discussion or decision as to the matter of interest; it was the ruling at the trial; the tenant for life, however, not having died, and the plaintiff not being evicted, there was evidently no ground for any allowance of interest.

([a]) Sterling *v.* Peet, 14 Conn. 245; Hardy *v.* Nelson, 27 Me. 525; Caulkins *v.* Harris, 9 Johns. 324; Baxter *v.* Ryerss, 13 Barb. 267; Welsh *v.* Kibber, 5 S. C. 405.

([b]) Smith *v.* Compton, 3 B. & A. 407; Williams *v.* Burrell, 1 C. B. 402; Rolph *v.* Crouch, L. R. 3 Ex. 44; Fernander *v.* Dunn, 19 Ga. 497; Harding *v.* Larkin, 41 Ill. 413; Burk *v.* Clements, 16 Ind. 132; Adamson *v.* Rose, 30 Ind. 380; McDunn *v.* Des Moines, 39 Ia. 286; Cox *v.* Strode, 2 Bibb 273; Barnett *v.* Montgomery, 6 T. B. Mon. 327, 332 (*semble*); Kyle *v.* Fauntleroy, 9 B. Mon. 620; Robertson *v.* Lemon, 2 Bush 301; Ryerson *v.* Chapman, 66 Me. 557; Sumner *v.* Williams, 8 Mass. 162; Leffingwell *v.* Elliott, 10 Pick. 204; Reggio *v.* Braggiotti, 7 Cush. 166; Allis *v.* Nininger, 25 Minn. 525; Haynes *v.* Stevens, 11 N. H. 28; Willson *v.* Willson, 25 N. H. 229; Winnepiseogee P. Co. *v.* Eaton, 18 Atl. Rep. 171 (N. H.); Stewart *v.* Drake, 9 N. J. L. 139; Holmes *v.* Sinnickson, 15 N. J. L. 313; Morris *v.* Rowan, 17 N. J. L. 304; Pitcher *v.* Livingston, 4 Johns. 1; Waldo *v.* Long, 7 Johns. 173; Caulkins *v.* Harris, 9 Johns. 324; Bennet *v.* Jenkins, 13 Johns. 50; House *v.* House, 10 Paige 158; Rickert *v.* Snyder, 9 Wend. 416, 423; Baxter *v.* Ryerss, 13 Barb. 267; McAlpin *v.* Woodruff, 11 Oh. St. 120; Welsh *v.* Kibler, 5 S. C 405; Williams *v.* Burg, 9 Lea 455; Williams *v.* Wetherbee, 2 Aik. (Vt.) 329; Keeler *v.* Wood, 30 Vt. 242.

was reasonably done.[a] Where the plaintiff had sold the land to a third party, and upon discovery of the paramount title had submitted the claim of his grantee to arbitration, the owner of the paramount title not having resorted to an eviction suit, it was held that the costs of the arbitration proceedings could not be recovered from the defendant.[b] And so it must appear that any expense for which recovery is sought was reasonably incurred, and was sufficiently proximate to the injury. Thus, in Harrington *v.* Murphy,[c] the plaintiff discovered an incumbrance in the shape of an inchoate right of dower. He sold the land at auction, but the purchaser refused it on this account. It was held that the plaintiff could not recover the expenses of the auctioneer in that sale, as they were "too remote and indirect."

§ 983. **Counsel fees.**—It is generally held that counsel fees reasonably incurred in maintaining or defending an action for possession may be recovered.[d] In some

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[a] Drew *v.* Towle, 30 N. H. 531; Parker *v.* McDonald, 11 Up. Can. C. P. 478; Hodgins *v.* Hodgins, 13 Up. Can. C. P. 146; Hunter *v.* Johnson, 14 Up. Can. C. P. 123.

[b] Forsyth *v.* McIntosh, 9 Up. Can. C. P. 492.

[c] 109 Mass. 299.

[d] Beale *v.* Thompson, 3 B. & P. 405; Allen *v.* Blunt, 2 Wood & M. 121; Levitsky *v.* Canning, 33 Cal. 299; McGary *v.* Hastings, 39 Cal. 360; Harding *v.* Larkin, 41 Ill. 413; Swartz *v.* Ballou, 47 Ia. 188; Dale *v.* Shively, 8 Kas. 276; McKee *v.* Bain, 11 Kas. 569; Robertson *v.* Lemon, 2 Bush 301; Swett *v.* Patrick, 12 Me. 9; Ryerson *v.* Chapman, 66 Me. 557; Williamson *v.* Williamson, 71 Me. 442; Hoffman *v.* Bosch, 18 Nev. 360; Haynes *v.* Stevens, 11 N. H. 28; Kingsbury *v.* Smith, 13 N. H. 109; Drew *v.* Towle, 30 N. H. 531; Staats *v.* Ten Eyck, 3 Caines 111; Rickert *v.* Snyder, 9 Wend. 416; McAlpin *v.* Woodruff, 11 Oh. St. 120; Lane *v.* Fury, 31 Oh. St. 574; Pitkin *v.* Leavitt, 13 Vt. 379; Turner *v.* Goodrich, 26 Vt. 707; Keeler *v.* Wood, 30 Vt. 242; Brennan *v.* Servis, 8 Up. Can. Q. B. 191; Clark *v.* Robertson, 8 Up. Can. Q. B. 370; Stuart *v.* Mathieson, 23 Up. Can. Q. B. 135; Stubbs *v.* Martindale, 7 Up. Can. C. P. 52.

States, however, counsel fees cannot be recovered.(a) In Pennsylvania it has been held that where the grantor was notified of the suit and refused to defend, it was unreasonable for the plaintiff to defend, and he therefore cannot recover counsel fees.(b) The contrary has, however, with better reason, been held in England.(c)

Covenants in Leases.

§ 984. **Rule of avoidable consequences.**—In the case of leases, it will be found that the courts, after attempting for a time to preserve the analogy of the ancient warranty, and to treat the consideration as a sort of stipulated limit of the damages, have finally dispensed with it, and assimilated the rules in actions upon agreements of this nature to those governing in ordinary contracts. One peculiarity which runs through the cases is to be noted: the frequent necessity which arises for the application of the rule of avoidable consequences. When the relation of landlord and tenant exists, one party or the other is almost always in a situation in which ordinary prudence or the desire to reduce loss as much as possible will lead him, in case of a breach of covenant (*e. g.*, to repair, to rebuild, to insure, to make improvements), to take upon himself the burden of the performance; and to this the law will hold him when it is practicable. Of course the extent of the obligation depends altogether upon the particular circumstances of the case. The general rules governing it are fully considered in the chapter on Avoidable Consequences.

(a) Gragg *v.* Richardson, 25 Ga. 566; Leffingwell *v.* Elliott, 10 Pick. 204; Jeter *v.* Glenn, 9 Rich. L. 374, 380; Williams *v.* Burg, 9 Lea 455; Turner *v.* Miller, 42 Tex. 418 (overruling Rowe *v.* Heath, 23 Tex. 614, 620).

(b) Terry *v.* Drabenstadt, 68 Pa. 400.

(c) Rolph *v.* Crouch, L. R. 3 Ex. 44.

§ 985. **Covenant for quiet enjoyment—Early rule.**—The early cases held that the general rule limiting recovery to the consideration money in actions upon the covenant for quiet enjoyment applied also to leases. Thus in an early case,[1] *the plaintiff declared on a lease upon an implied covenant for quiet enjoyment. The court held, that no such covenant could be implied; but that, if there were an express one, the tenant, not having paid any purchase-money on obtaining the lease, would be entitled to nominal damages only, and this although he had made valuable improvements on the premises, saying, "A lease where no purchase-money is paid by the lessee, does not differ in principle in this respect from an ordinary conveyance in fee for a valuable consideration."

In a subsequent case,[2] it seems to have been thought that under the covenant for quiet enjoyment, the lessee might, on eviction, recover the value of the lease, less the rent reserved; but by a still later decision,[3] the arbitrary rule which in regard to conveyances, as we have seen, takes the price paid to be the value of the land, was laid down in regard to leases; and Mr. Justice Bronson said:

"Following that analogy, the rents reserved in a lease where no other consideration is paid, must be regarded as a just equivalent for the use of the demised premises. The parties have agreed so to consider it. In case of eviction the rent ceases, and the lessee is relieved from a burden which must be deemed equal to the benefit which he would have derived from the continued enjoyment of the property. Having lost nothing, he can recover no damages. He is, however, entitled to the costs he has been put to; and as he is answerable to the true owner for the mesne profits of the land for a period not exceeding six years, he may

[1] Kinney *v.* Watts, 14 Wend. 38, 41.
[2] Moak *v.* Johnson, 1 Hill 99.
[3] Kelly *v.* The Dutch Church of Schenectady, 2 Hill 105, 116.

recover back the rent he has paid during that time with the interest thereon. If this rule will not always afford a sufficient indemnity to the lessee, I can only say, as has often been said in relation to a purchaser, he should protect himself by requiring other covenants." **

It is still held in Pennsylvania that, in case of eviction from demised premises, where there was no fraud or misrepresentation of the lessor inducing the taking of the lease, the measure of damages, if rent has been paid in advance, is so much of the moneys advanced as would be payable at the stipulated rate for the unexpired part of the lease, with interest. If no rent has been paid in advance, no damages can be recovered by the lessee.(a) His liability to pay rent would cease from the time of the eviction. Upon an executory contract to give a lease, and a failure or refusal to give one, the rule of damages is the same, if the inability or refusal is without any fault or fraud on the part of the party promising to execute it. Where the refusal to give a lease results from the fraudulent conduct of the defendant, consequential special damages, on proper allegations in the complaint, may be recovered.(b) Where the lessee is required by the lease to make improvements, he cannot, upon eviction, recover the value of them, though the value of them has been set off by the lessor in an ejectment suit brought by the true owner.(c)

§ 986. **Exception to early rule.**—But in the case of a lease where the lessor fails to give possession, being able to do so, the rule is everywhere abandoned. Thus in an early case, * where an agreement in the nature of a lease, but without any covenants, was made to commence from

(a) Lanigan *v.* Kille, 97 Pa. 120.
(b) Sausser *v.* Steinmetz, 88 Pa. 324; McCafferty *v.* Griswold, 99 Pa. 270.
(c) Lanigan *v.* Kille, 97 Pa. 120.

a future day, and the owner, before the commencement of the term, leased the premises to another party, it was held, that the original lessee was not limited to his action of ejectment; that he might sue the lessor for the breach of the implied agreement to give him possession; and that in such action the measure of damages would be the difference between the rent reserved in the lease and the value of the premises for the term.[1] ** In a later case, the court, after stating that on general principles the measure of damages upon the breach of covenants for title would be the value of the estate lost at the time of the breach, said:

"In England, and in this and many other of the States, this rule has been departed from, and where there has been no fraud, an arbitrary rule has been established as best calculated to generally subserve the ends of justice. By this rule the damages upon breach of covenant for title is the price paid with interest not exceeding six years. It was established partly in analogy to the ancient remedy on warranty, by which the demandant recovered of the warrantor other lands of equal value, computed at the time when the warranty was made from which he was evicted, but probably more from the hardships and difficulties which it was conceived might attend the application of the natural rule. The same rule is applied to executory contracts to convey lands, where the vendor is unable to perform by reason of defective title, and has been guilty of no fraud or deception. But I understand this distinction to be recognized and settled, that if the executory vendor has it in his power to perform his contract, and refuses to do so, or has wrongfully put it out of his power, he takes himself without this arbitrary rule, and becomes liable under the general rule for the value of the estate at the time it was to have been conveyed. So, too, in the case of covenant for title in an executed conveyance, if the covenantor becomes himself an actor in ousting his grantee, in breach of his covenant, he puts himself without the pale or protection of this arbitrary rule of damages, and becomes liable upon his broken

[1] Trull *v.* Granger, 8 N. Y. 115.

covenant for the value of the estate he was instrumental in taking from his grantee."(a)

"As no consideration is paid in such case," observes Mr. Justice E. D. Smith, stating the general rule in delivering his opinion in the Court of Appeals of New York, in the same case,(b) "the rent reserved has been regarded as a just equivalent for the use of the demised premises, and as in case of eviction, the rent ceases, and the lessee is discharged from its payment, he recovers nominal damages, and for such mesne profits as he is liable to pay the true owner, and any costs he may have been compelled to pay in defense of his title. But this rule has not been very satisfactory to the courts in this country, and it has been relaxed or modified more or less to meet the injustice done by it to lessees in particular cases." And the ruling of the court below, that the measure of damages for the breach of the covenant for *quiet enjoyment* was the value of the lease at the time of the eviction, over and above the rent reserved, was accordingly affirmed. So in Chatterton *v.* Fox (c) it was held, the eviction having been tortious, that the tenant might recover the difference between the value of his lease for the unexpired term, and the rent reserved.

§ 987. **Present rule.**—In England, however, the true principle has been finally adopted and the actual loss is recovered. So in an action by a sub-lessee against the executors of his lessor for breach of a covenant of quiet enjoyment, it was held that he might recover the value of the term lost and the mesne profits, and also his costs of defending the actions of ejectment brought by the re-

(a) Masten, J., in Mack *v.* Patchin, 29 How. Pr. 20.

(b) 42 N. Y. 167.

(c) 5 Duer 64.

mainder-man.(a) In a later case in the same court (b) the landlord had executed to a tenant in occupation of premises a reversionary lease of them for a term of years, for which he had received a premium. He died before the commencement of the intended term. After his death the lease proved void, it appearing that he was only tenant for life, with power to grant leases in possession, but not in reversion. The intended lessee was compelled to accept another lease from another party, for a much shorter term and at a higher rent. It was held, in an action by the lessee against the representatives of the lessor, that the measure of the plaintiff's damages was the premium paid for the void lease, together with the difference in the value of the two leases and the excess of expenses of the new lease over those of the first. The cost of consulting counsel and surveyors was deducted, by consent. Erle, C. J., used the following language: "And though Sedgwick says that in many parts of America the rule as contended for by the defendant prevails, he pretty clearly intimates that upon the whole his own opinion is the other way. There is no judgment which sustains that contention; and there is a distinct judgment of this court which is opposed to it. It is also negatived by the universal rule, that one who breaks his contract must pay the damages proximately resulting from such breach." This decision was affirmed in the Exchequer Chamber,(c) and was followed in a later case.(d)

And the same rule now prevails in America, both in case of eviction (e) and of refusal by the landlord to de-

(a) Williams *v.* Burrell, 1 C. B. 402.

(b) Lock *v.* Furze, 19 C. B. (N. S.) 96, 118.

(c) L. R. 1 C. P. 441.

(d) Rolph *v.* Crouch, L. R. 3 Ex. 44.

(e) Dobbins *v.* Duquid, 65 Ill. 464; Ricketts *v.* Lostetter, 19 Ind. 125; Dexter *v.* Manley, 4 Cush. 14; Jewett *v.* Brooks, 134 Mass. 505; Schlemmer

liver possession.(a) In the tenant's action against his landlord for damages for expulsion from the premises before the end of his lease, improvements placed on the premises by the tenant rendering them more productive, are properly considered by the jury as showing the extent of his damage.(b) In an action by a lessee against his lessor for violating the contract of lease by not giving possession of the demised premises, the plaintiff was held by the Supreme Court of Pennsylvania to have been properly allowed to prove that after making the lease he sold his house and lot and personal property at vendue, for the purpose of preparing to take possession, and that, when he failed to obtain possession, he was without a house and was compelled to obtain lodgings.(c) But where the lease is wrongfully terminated by the landlord, the expense of moving cannot be recovered, if the tenant would have been at the same expense at the end of his term.(d) Where the leased building was burnt, and the lessor rebuilt and refused to give possession to the tenant, in the mistaken belief that the lease was determined by the fire, the measure of damages was held to be the value of the lease according to the state the building was in just before the fire, and not according to its improved value as rebuilt.(e)

If any rent has been paid in advance, that too may be

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v. North, 32 Mo. 206; Clarkson *v.* Skidmore, 46 N. Y. 297; Fitzgibbons *v.* Freisem, 12 Daly 419; Porter *v.* Bradley, 7 R. I. 538; Bolling *v.* Lersner, 26 Gratt. 36; Moreland *v.* Metz, 24 W. Va. 119.

(a) Snodgrass *v.* Reynolds, 79 Ala. 452 (*semble*); Rose *v.* Wynn, 42 Ark. 257; Adair *v.* Bogle, 20 Ia. 238; Dodds *v.* Hakes, 114 N. Y. 260; Newbrough *v.* Walker, 8 Gratt. 16; Marrin *v.* Graver, 8 Ont. 39.

(b) Ricketts *v.* Lostetter, 19 Ind. 125.

(c) Yeager *v.* Weaver, 64 Pa. 425.

(d) Eddy *v.* Coffin, 149 Mass. 463.

(e) Hodgkins *v.* Price, 141 Mass. 162.

recovered.(a) But conjectural profits expected from the use of the premises cannot be recovered.(b)

§ 988. **Covenant to pay rent.**—* In regard to the principal stipulation on the part of the lessee, to pay rent, a question sometimes presents itself in regard to its apportionment; and it appears that where the plaintiff fails to prove title to the whole estate, as, for instance, when there are several assignees of the orginal lessor, the apportionment must be according to the value of the several parts held by each, and not according to the quantity or number of acres.[1]

In an English case,[2] one Theobald had demised to the plaintiff certain brick earth for twenty-one years, with full power to lessee to dig annually one-half acre, and if he dug more, to pay £375 to the lessor for every half acre so dug, being after the rate that the whole brick earth *was thereby sold or intended to be sold.* The suit was trespass by the lessee for digging; and the jury found for the plaintiff with £550 damages, being the full value of the whole of the brick earth dug by the defendant. Chambre, J., considered than the plaintiff's beneficial interest was no more that the difference between the value of the earth taken by the defendant, and the price that the plaintiff must have paid for it if he had taken it himself, and that all the remaining interest was in reversion. But the court held otherwise. Mansfield, C. J., said: "The consequence of this taking by a

[1] Hodgkins *v.* Robson, 1 Vent. 276; Farley *v.* Craig, 11 N. J. L. 262; Gillespie *v.* Thomas, 15 Wend. 464; Nellis *v.* Lathrop, 22 Wend. 121; Stevenson *v.* Lambard, 2 East 575; Cole *v.* Patterson, 25 Wend. 456; Van Rensselaer *v.* Bradley, 3 Denio 135; Van Rensselaer *v.* Gallup, 5 Denio 454; Van Rensselaer *v.* Jones, 2 Barb. 643.

[2] Attersoll *v.* Stevens, 1 Taunt. 183, 201.

(a) Denison *v.* Ford, 7 Daly 384.

(b) Snodgrass *v.* Reynolds, 49 Ala. 452; Alexander *v.* Bishop, 59 Ia. 572; Dodds *v.* Hakes, 114 N. Y. 260.

stranger, and of this action against the stranger, is, as between the lessee and the lessor, it must be taken to have been dug by the lessee; if this and what himself had dug did not together exceed the half acre per annum, there is nothing to pay; but if it exceeds that quantity, the lessee must pay the stipulated rent for the surplus"; and a rule to set aside the verdict was discharged. Here the lease was treated as a sale of the earth.**

§ 989. **Covenant to repair.**—* Upon the covenant by the lessee to repair, it has been doubted whether an action could be brought before the expiration of the term, as the tenant might put the premises in repair at any time before his occupation terminated; and in such a case, in New York, it was insisted on this ground that the plaintiff, the landlord, could recover only nominal damages.[1] But it seems well settled, both in England and this country, that on the covenant to repair the suit may be brought before the end of the term, and that, of course, actual damages are recoverable.[2]** The plaintiff will usually, in an action on this covenant, recover only damages actually suffered at the time of bringing the action. It will not be presumed that the defendant will continue to leave the premises in a state of unrepair; nor is it a breach of an entire contract.(a) In an action on an agreement to keep the premises of every description in good and sufficient repair at the tenant's expense, it was held that the defendant might show, and the jury might consider, the state of repairs at the commencement of the demise,

[1] Schieffelin *v.* Carpenter, 15 Wend. 400.

[2] Luxmore *v.* Robson, 1 B. & Ald. 584.

(a) Beach *v.* Crain, 2 N. Y. 86; *acc.* Phelps *v.* New Haven & N. Co., 43 Conn. 453.

in order to compute the damages for which the defendant was liable.[1]

§ 990. **General rule—Covenant by lessee.**—*As to the general rule of damages in an action on covenants of this nature, it was said by Lord Holt, in early case: "We always inquire in these cases what it will cost to put the premises in repair, and give so much damages."[2] **

* In a suit brought in the English Court of Exchequer, on a covenant to repair, it appeared that the premises, which had been destroyed by fire, were, at the time of the defendant's taking them, old and in bad repair; that the cost of reinstating them would be £1,635, but when so reinstated they would be more valuable by £600 than they were at the time of the fire. It was held that the defendant, being unable to make good the damages to the premises without putting them in a better state, was liable to pay as much only as would put the premises in the same state of repair as when he took them; and £600 were deducted from the total cost of repairs.[3] ** But it has since been held that the measure of damages on the general covenant to repair, when the term still continues, is the amount by which the value of the reversion is decreased by the failure to perform.[4] (a) In Williams *v.* Williams,(b) the lease con-

[1] Burdett *v.* Withers, 7 A. & E. 136.

[2] Vivian *v.* Champion, 2 Ld. Raym. 1125. In this case Lord Holt said, speaking in the loose manner in which the subject of compensation is treated in the early decisions: "In these actions there ought to be *very good damages*; and it has always been practiced so before me, and everybody else that I ever knew." This is a strong illustration of the extreme laxity which pervades all the early cases on the subject of damages.

[3] Yates *v.* Dunster, 11 Ex. 15; Young *v.* Mantz, 6 Scott 277.

[4] Smith *v.* Peat, 9 Exch. 161.

(a) Doe *v.* Rowlands, 9 C. & P. 734; Mills *v.* East London Union, L. R. 8 C. P. 79; Atkinson *v.* Beard, 11 Up. Can. C. P. 245. As to the elements entering into a computaion of such damages, see Middlekauff *v.* Smith, 1

(b) L. R. 9 C. P. 659, 666.

tained a general covenant to repair, and also a special covenant to repair on two months' notice. The plaintiff, who was lessee, gave notice to the defendant, who was sub-lessee, but, before the two months had elapsed, entered and repaired himself. It was held, the premises being actually in repair at the time of bringing the action, that the plaintiff could not recover for the expense of repairing, since that was not incurred under the general covenant, Coleridge, C. J., saying: "Now the answer to the first of these is that no substantial damages can be recovered under the general covenant where no damage has been done to the reversion, and the reversioner has not been injured by anything done or omitted to be done by the defendant." Of course, no recovery could be had under the special covenant, the action being brought before the expiration of the two months. Yet where the defendant, an under-lessee who had covenanted with the plaintiff, his lessor, to keep, and at the expiration or other sooner determination of the term, to deliver up the premises in repair, allowed them to fall out of repair—and while in this condition the superior landlord ejected the plaintiff and defendant for non-payment of rent, the plaintiff was held entitled to substantial damages for the non-repair of the premises.(a) Where land had been demised under a lease for 900 years, including covenants to pay rent and to keep the premises in good repair, the payments of rent fell into arrear and the premises out of repair. Upon a suit in equity, it was held that the petitioners were entitled to

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Md. 329. See, further, Pennsylvania R.R. Co. *v.* Patterson, 73 Pa. 491. But, *contra*, Nixon *v.* Denham, 1 Ir. L. R. 100. The rule is the same in an action on the covenant against waste: Whitham *v.* Kershaw, 16 Q. B. Div. 613.

(a) Davies *v.* Underwood, 2 H. & N. 570.

substantial damages for breaches of the covenant to repair, and not merely to such a sum as would, if kept at interest until the end of the term of 900 years, then suffice to put the premises in repair.([a])

But where the tenant *at the end of the term* leaves the premises out of repair, the measure of damages is the cost of putting them into repair, and not the depreciation in value of the property.([b]) Consequently the measure of damages is not changed by the fact that the premises are as valuable without the repairs as with them,([c]) nor that the lessor has contracted with a third party to have the buildings removed at the end of the term.([d])

Where a railway company, occupying the streets of the plaintiff city, covenanted to keep them in repair, the city, upon breach of covenant, was allowed to repair and to recover the reasonable expense of such repairs.([e]) The reason which ordinarily restricts recovery to the injury to the reversion did not apply here.

§ 991. Covenant by lessor.—In Hexter *v.* Knox ([f]) it was said that a covenantee could recover the full rental value of the premises which his covenantor failed to repair. A lease which was not assignable without the landlord's assent, contained a covenant that the sub-cellar of the premises should be "free from percolation of water through the walls." It was held that the difference in the yearly value of the lease was not a proper measure of damages for a violation of this covenant.([g]) A tenant

([a]) Macnamara *v.* Vincent, 2 Ir. Ch. 481.

([b]) Clow *v.* Brogden, 2 M. & G. 39; Watriss *v.* Cambridge Bank, 130 Mass. 343.

([c]) Morgan *v.* Hardy, 17 Q. B. D. 770.

([d]) Rawlings *v.* Morgan, 18 C. B. (N. S.) 776.

([e]) Mayor, etc., of New York *v.* Second Ave. R.R. Co., 102 N. Y. 572.

([f]) 63 N. Y. 561.

([g]) Benkard *v.* Babcock, 17 Abb. Pr. 421.

is allowed to recover the expense of repairing the premises, if actually repaired ; ([a]) and also the value of the use of the premises until the repairs are made.([b]) But the expense of repairs must be reasonable.([c]) So an item for contractor's risk in making the repairs should not be included, unless it was a usual and customary charge in making repairs.([d]) In an action brought on a covenant to keep one-half of a mill-dam in repair, it was held in Massachusetts that the plaintiff was entitled to recover only one-half of the actual expense incurred in repairing the dam.[1] ([e])

§ 992. **Consequential loss.**—* In an action[2] brought by lessee against lessor, on a lease containing a covenant "to repair, and keep in good and tenantable repair, all the external parts of the demised premises," it was proved that the corporation of Exeter, where the property was, had taken down the adjoining building ; that this had weakened the wall of the plaintiff's house, and that he was obliged to remove. After repeated fruitless requests to the defendant to repair, the plaintiff gave him notice that he should go on to rebuild at his (the defendant's) expense. While the work was going on the plaintiff removed to other premises, where he made some alteration to enable him to carry on his business, and restored things to their original state when his own building was completed, and claimed for all this in damages; but the Court of Queen's Bench said: "We are

[1] Thompson *v.* Shattuck, 2 Met. 615. [2] Green *v.* Eales, 2 Q. B. 225, 238.

([a]) Myers *v.* Burns, 35 N. Y. 269; Cook *v.* Soule, 56 N. Y. 420; Ward *v.* Kelsey, 42 Barb. 582; Keyes *v.* Western Vt. Slate Co., 34 Vt. 81.

([b]) Hexter *v.* Knox, 63 N. Y. 561.

([c]) Rutland *v.* Dayton, 60 Ill. 58.

([d]) Hayes *v.* Moynihan, 60 Ill. 409.

([e]) *Acc.* Fort *v.* Orndorff, 7 Heisk. 167.

of opinion that the defendant was not bound to find the plaintiff another residence whilst the repairs went on, any more than he would have been bound to do so had the premises been consumed by fire"; and, therefore, the items for rent and taxes of the house temporarily taken by the plaintiff, and those for alterations and restorations of it, were deducted; intimating, however, that if any evidence had been offered as to the length of time during which the plaintiff was obliged to be in another house, by reason of the defendant's delay in not acting on the notice given him by the plaintiff to repair, it might have been considered. And the actual cost of repairing and replacing the fixtures of the demised premises, of the surveyor's charge for superintendence, and for injury to the plate-glass and plastering, were allowed, the two last on the ground that if the defendant had taken proper steps to support the wall whilst the carpenters were taking down the adjacent building, the injury would have been avoided.**

In Thompson *v.* Shattuck [1] it was held that the plaintiff was not entitled to damages for any loss of profits in business, in consequence of the neglect of the defendant reasonably to aid in making the repairs. In Cook *v.* Soule (a) evidence was admitted of injury to goods in a building to show the value of the use of the building, but it was held that, if the lessee had left his property in it with the knowledge of its unrepaired condition, this evidence could not be admitted to enable the plaintiff to recover damages for injury to the goods. Grover, J., in this case said, that if the requisite repairs were trifling, and the damage, by not making them, might be large, it

[1] 2 Met. 615.

(a) 56 N. Y. 420. *Accord*, Campbell *v.* Miltenberger, 26 La. Ann. 72.

was the duty of the lessee himself to do the repairs. This would lead to the conclusion, perhaps, that, if he had authority to make the repairs and failed to do so, he could only recover the expense of making them, for the other damage might be said to be the result of his own neglect.[a] Where one had rented the plaintiff his flouring mill for three years, and agreed to put in operation in it certain additional machinery, which was defectively done, but the defects could have been repaired at an expense of $120, but were not repaired, and in consequence of them the plaintiff lost the use of the mill, the true measure of damages was held by the Supreme Court of Illinois to be the value of the use of the additional machinery.[b]

By the terms of the lease of a quarry the defendants were bound to repair a drain on the premises. Having been notified to make the repairs, they agreed from time to time to do so, and finally did, but not until two months after they ought to have done so. In consequence, the plaintiff was unable to work his quarry, and the court held that he was entitled to recover the actual damages thereby sustained.[c] So in an action against a landlord for breach of covenant to repair, it has been said that, although the ordinary measure of damages is the amount it would have cost the tenant to make the repairs, where the landlord has made them in a negligent and insufficient way, the tenant should be compensated

[a] But see Hexter *v.* Knox, 63 N. Y. 561.

[b] Green *v.* Mann, 11 Ill. 613. The court distinguished the case from that of Blanchard *v.* Ely (21 Wend. 342), on the ground that there the defendants had accepted the boat before she was entirely finished, and had gone on at their own expense and made the necessary alterations. Had the plaintiff in the present case repaired the machinery, which he was not bound to do, he could have recovered only the expense thus incurred. See also Phelan *v.* Andrews, 52 Ill. 486; Strawn *v.* Cogswell, 28 Ill. 457.

[c] Keyes *v.* Western Vt. Slate Co., 34 Vt. 81.

for the actual damage resulting.(a) * Where in the lease of a ferry the lessee covenanted to maintain and keep it in good order, and, instead of so doing, diverted travellers from the usual landing to another landing owned by himself, by means whereof the tavern-stand belonging to the plaintiff, the lessor, situated on the first landing, was so injured in its business as to become tenantless; it was held in an action by the landlord for breach of covenant, that he might assign and was entitled to recover as damages the loss of rent of the tavern-stand.[1] But in a subsequent decision,[2] it was intimated that the breach of covenant in this case was regarded as fraudulent.**

Where a lessee rented the premises to a sub-lessee, the lease of each containing the same covenant for repair, the lessee was not allowed to recover from the sub-lessee the costs of an action upon the covenant brought by the lessor against the lessee.(b) The tenant cannot recover for personal injuries suffered by an occupant of the premises, in an action against the landlord for breach of covenant to repair.(c)

§ 993. **Covenant to make improvements.**—Where the covenant is to put up a *new* building, the expense of putting up such a building will be *prima facie* the measure

[1] Dewint *v.* Wiltse, 9 Wend. 325.

[2] Blanchard *v.* Ely, 21 Wend. 342. Connected with this branch of our subject, in England, is the subject of repairs which incumbents of ecclesiastical property are there required to put upon it, and which, if not made, may form the subject of an action by the incoming incumbent against the representative of the outgoing one. The duty of the incumbent is stated in the old books to be *pro reparatione aut necessariâ re-edificatione* of the premises; Jenkins *v.* Betham, 15 C. B. 168, 182, and this has been, in the modern cases, declared to mean that the occupant of the premises must keep them in good and substantial repair, rebuild when necessary, but without regard to ornament; Wise *v.* Metcalfe, 10 B. & C. 299; Jenkins *v.* Betham, 15 C. B. 168, and on this footing the damages in case of dilapidation are to be computed.

(a) Walker *v.* Swayzee, 3 Abb. Pr. 136.

(b) Penley *v.* Watts, 7 M. & W. 601.

(c) Arnold *v.* Clark, 45 N. Y. Super. Ct. 252.

of damages. Fisher *v.* Goebel ([a]) was an action for the breach of a covenant by a lessor to build a wall. The rule laid down by Holmes, J., on a full consideration of the authorities, was that only the actual damages resulting from the defendant's default in relation to the wall, "to be measured by what it would cost to rebuild the wall, together with any loss that may have been sustained as the direct and immediate consequence of the insufficiency of the wall and the breach of the covenant, could be recovered."

In an action for failure to put up fences, the plaintiff recovers the cost of constructing them.([b]) A railroad corporation, in consideration of an amicable settlement of damages by the owner of lands taken for their road, agreed with him to fence the land taken; and failing to do so within a reasonable time, were sued by him for breach of the agreement. It was held that a subsequent erection of the fences by them, without the plaintiff's consent or approbation, did not affect his right to recover, and that the measure of his damages was the sum which it would fairly cost to erect the fences according to the agreement.([c]) But where in a lease for years the landlord agreed to fence, the measure of damages is not the cost of fencing, but the diminished rental value of the land without a fence, this being the lesser sum.([d]) In such a case the tenant is deprived of the use of the fence for the term. He would no doubt have a right to build the fence and then recover the value of it; but if he does not, his loss is evidently not the cost of fencing. Where the lessee agrees to fence, the case is different. Here the landlord is deprived of the full value of the fence. On a

([a]) Fisher *v.* Goebel, 40 Mo. 475.
([b]) Logansport, C. & S. Ry. Co. *v.* Wray, 52 Ind. 578.
([c]) Lawton *v.* Fitchburg R.R. Co., 8 Cush. 230.
([d]) Clarke *v.* Murray, Manitoba t. Wood 127.

tenant's failure to make improvements, the measure of damages was held, in Raybourn *v.* Ramsdell,[a] to be the reasonable cost of making the improvements, and the difference in rental value between the improved and unimproved land from the time of the expiration of the lease until the improvement could be made. But in Prescott *v.* Otterstatter[b] it was held that the tenant could recover against the landlord, on a covenant to make improvements, only the difference between the value of the premises, improved and unimproved. In Chamberlain *v.* Parker,[c] the plaintiffs leased to the defendant a lot in the Pennsylvania oil region, reserving no rent, and stating no term, but the defendant covenanted in the lease to sink a well on the premises by the first of July following. There was a right of re-entry reserved to the lessors on the breach of the lessee's covenants. In an action for damages brought by the lessors for breach of the above covenant, they were held entitled to a nominal recovery only, the damages being entirely conjectural. On breach of covenant by a lessor to dig ditches in the land, the measure of damages is the difference in the annual value of the land with and without ditches.[d]

§ 994. **Covenant to rebuild.**—* In an action on a covenant to rebuild contained in a lease, the defendants were assignees, and the plaintiff's wife tenant for life. The plaintiff contended that, as tenant for life, she was entitled to recover general damages—in other words, the whole amount of damages sustained by the breach, and was not to be restricted to a compensation measured by the ex-

[a] 78 Ill. 622.
[b] 79 Pa. 462.
[c] 45 N. Y. 569.
[d] M'Ewen *v.* Dillon, 12 Ont. 411.

tent of her particular estate. But Gibbs, C. J., at Nisi Prius, held otherwise, and that the tenant, in tail or in fee, might have an action on the covenant and recover for the injury done to his reversionary interest.[1] **

§ 995. **Covenant to insure.**—* In England it has been held by Lord Ellenborough, at Nisi Prius, that where a lease contains a covenant to repair the premises, and also to insure them for a specific amount against fire, the sum fixed in the latter covenant does not regulate the damages under the former.[2] ** The measure of damages is the value of the building lost, not exceeding the agreed amount of insurance; and this was not altered by the fact that the lease gave the lessor a right, on the lessee's default, to insure at the lessee's expense.([a])

§ 996. **Covenant to renew.**—When the covenant is broken by the lessor's exacting an increased rent in a new lease, the measure is the difference between what the lessee was to have paid for the rent for the term, and what he was compelled to pay.([b]) And in an action for breach of this covenant against the personal representatives of a lessor holding under the College of Dublin, where the covenantor had been evicted by title paramount, the jury, in determining the value of the lease, were allowed to consider the evidence of a witness as to such value founded on the risk, on one side, that the college might not renew, and the chance, on the other, that they would. In the same case, although the plaintiffs gave no evidence of any eviction from the possession of the lands in question by the lessor or any person under him, the refusal of the

[1] Evelyn *v.* Raddish, 1 Holt 543. This case was reconsidered in 7 Taunt. 411, but on another point.

[2] Digby *v.* Atkinson, 4 Camp. 275.

([a]) Douglass *v.* Murphy, 16 Up. Can. Q. B. 113.

([b]) Tracy *v.* Albany E. Co., 7 N. Y. 472.

judge to direct the jury to find nominal damages only, was sustained.[a] Where one bought of a tenant an unexpired lease, on the agreement of the landlord to renew it at the expiration of the term, and they both refused to so renew, and the landlord died before the end of the term, it was held that the measure of damages in a suit against the landlord's administrator was the price paid and interest, and not the value of the contract.[b] Where the covenant was to renew at a rent to be fixed by arbitration, and the lessee erected buildings on the land, but the renewal was prevented by failure of title in the landlord, the measure of damages was held to be the difference between the value of the lease and the probable ground rent.[c]

§ 997. **Covenant to give up possession.**—In an action upon a guaranty that a lessee should perform his covenant to surrender the premises at the end of the lease, the rent stipulated in the lease furnishes presumptively the measure of damages, to be computed by reference to the time during which the plaintiff is kept out of possession.[d] But the rent fixed in the lease is not conclusive; the lessor may recover the fair rental value.[e] So in Henderson *v.* Squire,[f] where a tenant failed to comply with an agreement to deliver up possession at the date agreed upon, an under-tenant being in possession, the landlord was allowed to recover the value of the premises for the time he was kept out of them, and the cost of dispossessing the under-tenant.

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[a] Strong *v.* Kean, 10 Ir. L. R. 137.

[b] McClowry *v.* Croghan, 31 Pa. 22.

[c] Van Brocklin *v.* Brantford, 20 Up. Can. Q. B. 347.

[d] Otto *v.* Jackson, 35 Ill. 349; compare McKinney *v.* Peck, 28 Ill. 174; Prickett *v.* Ritter, 16 Ill. 96.

[e] Keegan *v.* Kinnare, 123 Ill. 280.

[f] L. R. 4 Q. B. 170.

§ 998. **Covenant to allow removal of buildings, fixtures, etc.**—In an action on a covenant to permit the tenant to remove mantels and grates at the end of the term, the measure of damages is the value of the mantels and grates in place.(a) So in an action by the tenant for the landlord's refusal to allow him to remove a building the measure of damages is the value of the building *on the land.*(b) But in a similar action by one who bought at a mechanic's lien sale, for the purpose of removal, for refusal to allow plaintiff to remove the building purchased, the plaintiff was allowed only the value the building would have if removed, not its value as it stood on the land; (c) the court saying, "The plaintiff has no right to measure his damages by the defendant's benefit."

§ 999. **Other covenants in leases.**—* In New York,[1] it is held that where it is covenanted between the lessor and the lessee, that at the expiration of the term, the buildings and improvements on the demised premises are to be valued by persons to be chosen by the parties, which valuation the lessor is to pay the lessee; if, on the expiration of the term, the lessor refuses to agree on the appraisers, and the lessee appoints them, and has the buildings appraised, the valuation thus made, being *ex parte*, is not conclusive as to the amount of damages, but that they are to be ascertained by the jury.** In an action on

[1] Holliday *v.* Marshall, 7 Johns. 211.

(a) Bruce *v.* Welch, 52 Hun 524. The court gave as a reason for the decision the equitable principle that the defendant should not be allowed to profit by his wrong, as would happen if the plaintiff recovered only the value of the fixtures after severance. It would seem that the plaintiff's actual loss was the value before severance, since he could sell them at that valuation to the landlord or to an incoming tenant.

(b) Neiswanger *v.* Squier, 73 Mo. 192. The form of action was not covenant, but trover.

(c) Seibel *v.* Sieman, 72 Mo. 526.

a covenant to heat the leased premises the measure of damages is the difference in value of the premises heated as stipulated in the lease, and the value as they were in fact heated; not, however, exceeding the reasonable cost of supplying the heat.(a) In an action on the covenant not to assign or under-let, the measure of damages is the loss caused to the landlord by having a tenant of less ability than the defendant to pay the rent.(b)

§ 1000. Costs as between lessee and sub-lessee.—*A question has arisen on covenants in leases, as between lessee and sub-lessee, which goes to illustrate the general subject which we are now considering. Elizabeth Coppock demised certain premises to the plaintiff with covenant to repair by lessee; the plaintiff demised the premises to one Finch, for a portion of his own term, with covenant to repair and leave in repair, by lessee. Finch assigned to the defendant, who broke the covenant, by leaving them out of repair at the end of the term. By reason of this, the plaintiff was obliged to pay Elizabeth Coppock, the chief lessor, £10 damages and £100 costs of both sides in the suit brought on the covenant. On the question whether the costs were recoverable by the lessee, against the sub-lessee, the Court of King's Bench held they were, saying: "If the plaintiff could not recover those damages and costs against the defendant, he would be without redress for an injury sustained through the neglect of the defendant, and not in consequence of his own default."[1]

Here it will be seen that there was no covenant to indemnify by the sub-lessee; and on this ground the

[1] Neale *v.* Wyllie, 3 B. & C. 533.

(a) McCormick *v.* Stowell, 138 Mass. 431.
(b) Williams *v.* Earle, 9 B. & S. 740.

decision just stated has been overruled by the English Exchequer. Price made a lease to Penley of certain premises, with covenant that he, Penley, would repair. Penley under-let to Watts, also with covenant to repair; but the covenants were dissimilar. Price sued the plaintiff for breach of covenant to repair, in the original lease. The dilapidations proved were £57 10*s.*; in addition to which the plaintiff's costs amounted to £36, and the defendant's to £40. These costs were claimed against Watts. The judge who tried the cause held, that as there was no covenant to indemnify, the defendants in this suit were not liable to costs; and the plaintiffs were allowed to recover only the amount of £57 10*s.*, with leave to move to increase it by the amount of costs, £76. On showing cause, this was held right, and Parke, B., said: "If the plaintiffs had desired to be secured against these costs, they might have made themselves safe by taking a covenant of indemnity against any breach of the covenants in the original lease; and then they might have recovered these costs."[1] **

[1] Penley *v.* Watts, 7 M. & W. 601, 609.

CHAPTER XXXIII.

THE MEASURE OF DAMAGES IN ACTIONS ARISING FROM THE SALE OF REAL ESTATE.

I.—Breach by Vendor.

§ 1001. English rule — Flureau *v.* Thornhill.
1002. Cases following Flureau *v.* Thornhill.
1003. Engel *v.* Fitch.
1004. Bain *v.* Fothergill—Present English rule.
1005. General considerations.
1006. Exceptional cases — Vendor refuses to convey, being able to do so.
1007. Vendor contracts with reference to complete title.
1008. General rules of American law.
1009. The rule of nominal damages.
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§ 1011. In case of knowledge that title is in third party.
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1016. Quality or quantity deficient.
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II.—Breach by Vendee.

§ 1023. Difference between value and contract price recoverable.
1024. Contract price recoverable in some States.
§ 1025. Interest and expenses.
1026. Deposits at auction.

III.—Fraud in Sale of Land.

§ 1027. Measure of damages for fraud.
1028. Deficiency in quantity.
§ 1029. The rule in Smith *v.* Bolles.

Breach by Vendor.

§ 1001. English rule—Flureau v. Thornhill.—Contracts to convey land, which are usually under seal, may be

broken either by the vendor failing to convey, or by the vendee failing to pay the price. We shall first discuss the measure of damages when the vendor fails to convey.

In order to give an understanding of the present state of the law in England on this subject, it is necessary to review the decisions in detail. In an early case, where one had paid a price for a lease, the intended lessor was evicted before the lease was made, and an action having been brought in the Court of Marches, in Wales, a prohibition was sought from the King's Bench; it was said by the court that an action of debt would not lie, but that an action on the case would lie for loss of the benefit of the intended lessee's bargain, in which he could recover not only what he had paid for the price, but damages also for the breach of the contract.[a] The leading case, however, is Flureau *v.* Thornhill,[b] decided in 1776. The facts were as follows: The plaintiff bought at auction the unexpired term of a lease for £270 and paid a deposit of £54. The defendant could not make a good title, but offered to convey his title with all its faults or to give back the deposit with interest and costs. The plaintiff, however, claimed damages for the loss of his bargain, and also by reason of his having sold stocks to pay the purchase-money, which stocks had since risen in value. The defendant gave evidence that the bargain was by no means advantageous. The jury gave £20 damages, besides requiring the return of the deposit. The court ordered a new trial. Clearly the item of loss by sale of stocks could not have been recovered, and the admission of evidence to show such loss would have been an error which would by itself have required a new trial. Blackstone, J., in his opinion, seemed to assume that the

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[a] Brigs' Case, Palmer 364 (21 Jac. I., 1628).

[b] 2 Wm. Bl. 1078.

damages were given by the jury to compensate for that loss, in which case a new trial should have been ordered. The court, however, based their decision on the ground that the purchaser could not recover for his bargain. The following are the opinions of the judges in the case —De Grey, C. J., said:

"I think the verdict wrong in point of law. Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost."

Gould, J., was of the same opinion. Blackstone, J., said:

"These contracts are merely upon condition frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected. For curiosity, I have examined the prints for the price of stock on the last 3d of November, when three per cents sold for 87½. About £310 must therefore have been sold to raise £270. And if it costs £20 to replace this stock a week afterwards (as the verdict supposes), the stocks must have risen near seven per cent. in that period, whereas in fact there was no difference in the price. Not that it is material; for the plaintiff had a chance of gaining as well as losing by the fluctuation of the price."

Nares, J., after some delay, concurred in the result. De Grey, C. J., simply stated what he considered the law to be, without giving any reason for it. The reason given by Blackstone, J., is the one usually approved, where the case is followed.

§ 1002. **Cases following Flureau v. Thornhill.**—In the case of Bratt *v.* Ellis (1805),(a), the English Court of Common Pleas, and in that of Jones *v.* Dyke (1807),(b) Macdonald,

(a) App. to Sugden on Vendors, 14th ed., No. 5.
(b) Ib., No. 6.

B., at *nisi prius*, applied this principle in determining the liability of auctioneers selling real estate without authority from the owners, but in good faith, and the plaintiff in each case recovered merely his expenses. In Hopkins *v.* Grazebrook ([a]) the defendant put up property at auction, having no title to it or claim of title, but having a contract with a third person for its purchase. He acted *bona fide* in doing so, and his failure to perform was due to a misunderstanding between his vendor and the owner, for which he was in no way to blame. He was held responsible for the damage sustained by the plaintiff through the breach of the contract. Abbott, C. J., distinguished the case from Flureau *v.* Thornhill, saying:

"There the vendor was the owner of the estate, and an objection having been made to the title, he offered to convey the estate with such title as he had, or to return the purchase-money with interest; here no such offer was or could be made. The defendant had, unfortunately, put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer *some* title, and having entered into a contract to sell without the power to confer even the shadow of a title, I think he must be responsible for the damage sustained by a breach of his contract."

Bayley, J., based his decision on the ground that the vendor by selling property holds it out as his own, so far as he knows, and is responsible for any damage which results. In the case of Walker *v.* Moore,([b]) the defendant agreed to sell certain farms, and delivered an abstract showing a good title; the plaintiff then resold the property. The title failing, he recovered at the trial the expense of the resale, the expenses incurred by sub-purchasers in investigating the title,

([a]) 6 B. & C. 31.
([b]) 10 B. & C. 416, 420.

and £1,500 damages for the loss of his sub-contract. The court in banc held this to be an error and directed a nonsuit (the defendant having paid into court £164). Bayley, J., distinguished the case from Hopkins *v.* Grazebrook, saying: "There the defendant had sold property as his own, which was not so, and the court was of opinion that the defendant being in fault by representing himself as the owner of the property, the plaintiff's right was not restrained to nominal damages, and there the principle on which the jury assessed the damages is not stated." But he added: "And, further, if there were *mala fides* in the original vendor (but not otherwise), I am not prepared to say that the purchaser might not recover the profit which would have arisen from the resale." Littledale, J., said: "When a contract for the purchase of lands is made, each party cannot but know that the title may prove defective and must be taken to proceed upon that knowledge." In the case of Tyrer *v.* King, at *nisi prius*,[a] one Dale, an auctioneer, under instructions which had been given him about two years before to sell certain premises belonging to the defendant, sold them to the plaintiff. By the terms of the sale the plaintiff was to have immediate possession. The defendant declined to execute the contract, his solicitor stating that the property was actually sold to another. The defendant having paid into court the amount of the plaintiff's deposit and expenses, the plaintiff was nonsuited by Cresswell, J., who held that he was not entitled to recover for the loss of his bargain. In the case of Robinson *v.* Harman,[b] the premises had belonged to the defendant's father, who had recently died, and in consequence the plaintiff's solicitor, while preparing the

[a] 2 C. & K. 149.
[b] 1 Ex. 850, 855.

agreement of sale, asked the defendant whether he was sure that he had power to grant the lease without the concurrence of other parties, and suggested that the will might have vested the legal estate or the power of leasing in trustees. The defendant replied that there was nothing of the sort; that it was his property out and out, and that he alone had the power of leasing. It appeared, however, that the defendant's father had devised the premises (subject to an annuity to his daughter) to trustees, to pay the defendant a moiety of the rent during his life only. Denman, C. J., on the trial, under a plea which admitted the contract, rejected the offer of evidence to show that the plaintiff, when he entered into the agreement, had full knowledge of the defendant's incapacity to grant the lease, and was of opinion that the plaintiff was entitled to damages for the loss of his bargain, which the jury found accordingly. The Court of Exchequer discharged the rule *nisi* for a new trial, the learned barons all agreeing that the case came within the general rule of law as applied in Hopkins *v.* Grazebrook, that "where a person makes a contract and breaks it, he must pay the whole damage sustained." Parke, B., said:

"The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The case of Flureau *v.* Thornhill qualified that rule of the common law. It was there held, that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law."

The principle of Flureau *v.* Thornhill was reaffirmed by

the Court of Common Pleas in Worthington *v.* Warrington,(a) and again by the Irish Court of Queen's Bench, in the case of Buckley *v.* Dawson.(b) In the latter, the defendant, having recovered possession of certain lands in ejectment, brought to get rid of a reversionary lease, and supposing he had got rid of it, agreed to demise the lands to the plaintiff. The plaintiff entered into possession and was ejected by the person entitled to the reversionary lease. The case was considered as controlled by Flureau *v.* Thornhill, and the plaintiff was not allowed to recover damages for the goodness of his bargain. The decision was put partly on the seller's good faith. Lefroy, C. J., in delivering his opinion, observed: "The whole matter was *bona fide*, and no issue was sent to the jury or required to be sent as to fraud." Crampton, J., said: "In the case before the court no fraud is imputed." Perrin, J., concurred, and Moore, J., the remaining Justice, said: "There was no fraud or misrepresentation." In the case of Pounsett *v.* Fuller,(c) the defendant agreed to sell the plaintiff the right of shooting on a third person's manor for a specified term. It turned out that he had no title which he could convey, but a mere agreement from the owner of the manor to let him the shooting for five years at a stipulated rent. The court considered that the case came within the authority of Walker *v.* Moore, *supra;* Jervis, C. J., observing that though the defendant "had not a right to sell what he professed to sell," yet that, "as a layman, he had a fair right to believe he had the power to sell which he professed to have." And the ruling of the learned judge at the trial, that the

(a) 8 C. B. 134.
(b) 4 Ir. C. L. 211.
(c) 17 C. B. 660.

plaintiff was entitled to recover "nothing beyond the expenses in investigating the title down to the time when the contract was broken, and nominal damages for the breach," was accordingly sustained. In the case of Sikes *v.* Wild,(a) the principle of Pounsett *v.* Fuller was stretched still further. It appeared that real estate had been devised in trust to the defendants to sell. The solicitor employed in the affairs of the trust knew that the devisor held the estate subject to a settlement, by which the legal estate was in trustees for the purpose of securing an annuity to the widow of the devisor, and that no unincumbered title could be made to any part of the estate unless she and her trustees would discharge the part sold from the trust. This she verbally agreed to do, but afterwards changed her mind. The solicitor was of course aware that she was not bound by her verbal agreement. In an action for breach of the contract to sell, the jury having found that the defendants *bona fide* believed they would be able to make a good title free from incumbrances, and had reasonable grounds for so believing, the Queen's Bench held that the purchaser was not entitled to damages for the loss of his bargain. Mr. Justice Blackburn delivered the opinion of the majority of the court. Referring to the general rule in contracts for the sale of land, he said :

"That rule, which is an exception from the general rule of the common law, was first laid down in Flureau *v.* Thornhill as long ago as 1776. It was constantly acted upon until the case of Hopkins *v.* Grazebrook (which introduced an exception in cases where the vendor was not in possession, on which I shall observe presently). It was again acted upon in Walker *v.* Moore, where Parke, J., puts the rule upon what I take to be the true ground, namely, that it is implied from the usage of this particular business."

(a) 1 B. & S. 587, 591, 596.

The learned judge, referring to the view taken by the court in Pounsett *v.* Fuller, that the exception in Hopkins *v.* Grazebrook depended on misconduct, said :

"My brother Williams expresses doubts, in which I fully sympathize, as to the soundness of the exception in Hopkins *v.* Grazebrook in any point of view. I do not see how the existence of misconduct can alter the rule by which the damages for the breach of a contract are to be assessed ; it may render the contract voidable on the ground of fraud, or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself. And if it be said that the rule depends upon an implied condition resulting from the general understanding of vendors and purchasers (which is the ground taken by Parke, J., in Moore *v.* Walker, and I think the true one), and that the usage is such that this implied condition excludes such cases as Hopkins *v.* Grazebrook, I think it will be worthy of the consideration of any court competent to review that case, whether the strong opinion of Lord St. Leonards, repeated in his 13th edition of Vendors and Purchasers, p. 301, does not show that the general understanding of conveyancers has been misapprehended."

He rested the decision on the authority of Flureau *v.* Thornhill, holding that the facts did not bring the case within any exception, since the defendants were not out of possession, they were not entirely without title, nor were they guilty of any misconduct. As to the case of Robinson *v.* Harman, he said that the report left it impossible to say whether the court thought the exception in question rested on the ground of misconduct, want of possession, or want of legal title. Cockburn, C. J., dissented, holding that the facts brought this case within the principle of Hopkins *v.* Grazebrook, since the defendants sold, having no title, legal or equitable, and they knew at the time that the consent of the widow was necessary. "They were, therefore, contracting to sell at a time when they knew they had no power to sell, and no more than the expectation of making out a title." As

to the general principle of Flureau *v.* Thornhill, he said:

"That immunity is in itself an anomaly. It probably had its origin in the difficulty in which, in the complicated and highly artificial state of our law relating to real property, an owner of real estate, having contracted to sell, is too frequently placed from not being able to make out a title such as a purchaser would be bound or willing to take. The hardship which would be imposed on a *bona fide* vendor if, upon some legal flaw appearing in his title, he were held liable in all the consequences which would attach upon a breach of contract relating to personalty, and the difficulty which might be thrown in the way of bringing real property into the market if the full liability attached in such a case have probably, by an understanding and usage among those engaged in the transfer of estates, led to this exception to the general law. But I can see no reason, in the absence of authority, for extending the exception to parties who, knowing that they have not any present estate to convey, take upon themselves to sell, in the speculative belief that they will be able to procure an interest and title before they are called upon to execute the conveyance."

He distinguished Pounsett *v.* Fuller on the ground that there the defendant was in possession, had an equitable title, and believed himself to be in a condition to convey, while in the case at bar the defendants knew that they had no title, and that they sold in the expectation of the widow's signing. The case was unanimously affirmed in the Exchequer Chamber; (a) Erle, C. J., of the Common Pleas, delivering the opinion, declared that the case must be governed by Flureau *v.* Thornhill, unless it came within the exception of Hopkins *v.* Grazebrook. He, however, put the latter decision on a different ground from that on which it was put by the Chief-Justice of the Queen's Bench, saying that the principle of the exception was "that if the intended vendor knowingly withholds from the in-

(a) 4 B. & S. 421.

tended vendee that he has not a title, he is guilty of culpable want of truth, and is bound to make the latter compensation for the loss of his bargain, and ought not to have the protection of the doctrine established by Flureau *v.* Thornhill." Continuing he said : "If that principle is to be established whenever it comes to be well analyzed, it will be time to consider if actual fraud is necessary to take away the protection." The decision is approved by Lord St. Leonards.(a) In commenting on the case, he observes :

"The right of the sellers stood simply thus : they had not the legal estate, and they could not obtain it during the widow's life without her consent, nor could they discharge the estate of her £100 a year. But subject to that, they were owners in possession of the equitable fee simple with a right to call for the legal estate upon her death. The devise, so far from being inoperative, passed this equitable estate in fee, and the devisees had not an expectancy or even a reversion, but the entire equitable fee, and could make a good title to it, subject to the annuity of £100. The widow's promise might be considered as a full justification of the trustees in selling the estate as if free from the annuity, and if after the sale they could have procured her concurrence, the purchaser would have been compelled to take the title, and if a bill had been filed, time would have been allowed, if there was a fair prospect that a release of the annuity could be obtained."

§ 1003. **Engel v. Fitch.**—On the other hand, in the case of Engel *v.* Fitch (b) the views of Lord C. J. Cockburn were adopted. In this case, the defendants, who were mortgagees of the lease of a house, sold it by auction to the plaintiff, but the mortgagor, who was in possession, refused to give it up, and the defendants declined to fulfil the contract on account of the expense of obtaining possession. The plaintiff having meantime resold the premises to a third party at an advance, was allowed to

(a) Sugden on Vendors, 14th ed., p. 361.

(b) 9 B. & S. 85 ; 10 B. &. S. 738 ; L. R. 3 Q. B. 314 ; L. R. 4 Q. B. 659.

recover damages for the loss of his bargain, the measure of which was the profit he would have made on the resale, besides his expenses. "The purchase of real property sold by auction for the purpose of a resale," said the Chief-Justice,(a) "is a matter of every-day occurrence, and the possibility of a resale cannot be taken to be beyond the contemplation of the parties to such a contract." Cockburn, C. J., distinguished the case from Flureau *v.* Thornhill, saying (p. 324):

"The obstacle to the completion of the contract had no reference to title. It was one which the vendors were not unable, but which, on account of the expense, they were unwilling to remove. They might, had they chosen to incur the expense, have ousted the mortgagor by ejectment, as they, in fact, did, after they had put an end to the present contract. Lastly, it was not the purchaser, but the sellers, who repudiated the contract."

Referring to the authority of Flureau *v.* Thornhill, he said (p. 325):

"The question mainly turns on whether the rule referred to is an exceptional one, and therefore only applicable to the special circumstances with reference to which it has been laid down; or one which, from any peculiarity in the nature of contracts relating to the transfer of real property, ought, in the absence of fraud, to be extended to contracts of this description. Now, however firmly settled the law as laid down in Flureau *v.* Thornhill may be, it must be admitted that that case itself is anything but satisfactory."

He then proceeded to criticise the qualification of the rule of Flureau *v.* Thornhill, that it should only be applied in the absence of fraud. As to Hopkins *v.* Grazebrook, he said (p. 329):

"There is an obvious difference between the case of a man who, being in possession and the undoubted owner of real

(a) L. R. 3 Q. B. 314, 334.

property, is unable to make out a marketable title, and that of one who, not being the owner, but having only a contract for the purchase of real estate, takes upon himself to sell it to another as his own, and as if the title were his to convey. The difficulty of making out title, which exists in the one case, and forms the foundation of the rule, and the justification of the exceptional departure from ordinary principles, is wholly wanting in the other." (a)

Cockburn, C. J., proceeded to lay down the following rule (p. 330):

"Viewed by the light of what is said by Lord Wensleydale and Alderson, B., in Robinson *v.* Harman, as also upon general principles, the whole matter seems capable of being put on a clear and intelligible footing. By the law of England, as a general rule, a vendor who, from whatever cause, fails to perform his contract, is bound, as was said by Lord Wensleydale, in the case referred to, to place the purchaser, so far as money will do it, in the position he would have been in if the contract had been performed. If a man sells a cargo of goods not yet come to hand, but which he believes to have been consigned to him from abroad, and the goods fail to arrive, it will be no answer to the intended purchaser to say that a third party, who had engaged to consign the goods to the seller, has deceived or disappointed him. The purchaser will be entitled to the difference between the contract and the market price. There is nothing in the nature of real property which, either on technical or general grounds, should take a contract for the sale of real estate out of this general rule, with one single exception, namely, that owing to the state of the law as to real property, the undoubted owner of an estate often finds, unexpectedly, difficulty in making out a title which he cannot overcome. If, an obligation to make out title being implied on every such contract, the opposite party rejects the title and repudiates the contract, it seems not altogether unreasonable that he shall be entitled to no more than the return of the deposit, if any, and the expense of investigating the title. In this exceptional case, he is put, not in the condition in which he would have been if the contract had been performed, but in the condition which he would have been

(a) This language was approved by Kelly, C. B., in the Exchequer Chamber.

if the contract had not been made. He is where he was before, without the estate and the benefits it would have brought him if a title could have been made to it. But the limit of the exception is to be found in the reason on which it is based; the reason ceasing, the rule should also cease. It can properly have no application where the non-performance of the contract arises not from a difficulty as to title, but from the fact of the party who engages to sell not having first secured to himself the property in the thing of which he takes on himself to dispose. In such case there seems no sound reason why the consequences which arise on a breach of contract in the sale of goods should not equally attach. Far from seeing any grounds, either in law or reason, for extending the rule, there appear to us good grounds for the contrary. In our view, notwithstanding what is said by Erle, C. J., in Sikes *v.* Wild, the rule is an anomalous one —that is to say, it is a departure from general principles, and inconsistent with ordinary rules of law, based upon and applicable to a special and exceptional state of things alone. There is, therefore, no reason, in a legal point of view, for extending it; while on the other hand, there seems good reason for not encouraging men to affect to sell property, the power to dispose of which they have not secured, and thereby to entail inconvenience and possible loss on the purchasers, without, at least, bringing to the knowledge of the latter the real position in which they stand."

He then referred to Pounsett *v.* Fuller and Sikes *v.* Wild, as establishing the doctrine that the possession of an equitable estate, and the reasonable belief of obtaining the legal estate, excuses the seller from liability for damages. In delivering the opinion of the Exchequer Chamber in the same case, affirming the judgment below, Kelly, C. B., observed,[a] as to the method of ascertaining the damages, if substantial damages are given:

"But there is a preliminary objection raised by the defendants, that this market value is not shown, and that a resale cannot be taken into consideration as within the contemplation of the parties. On the latter point, we are inclined to agree with the

[a] L. R. 4 Q. B. 659, 667.

defendants ; but surely the fact that there was a resale at an enhanced price is evidence that the market value had advanced to that extent—there being no evidence to the contrary, and no cross-examination on the subject. Indeed, as the verdict was taken by consent, it cannot now be disputed that there was this advance in price ; and the question left for us is, in fact, whether the plaintiff is entitled to recover in respect of this advance in the market value. No case has been cited in which the purchaser of real property has been disentitled to recover damages like the present, except the case of Flureau *v.* Thornhill and the cases which followed it, and upon the one ground of the vendor's inability to make out a title. And there is no authority to show that when the breach of contract has been on any other ground, any other rule as to damages applies in contracts as to the sale of real property than that which prevails in the ordinary case of a breach of contract."

He declared this case not to be within the rule of Flureau *v.* Thornhill, since that is confined to cases where the vendor fails to convey because of inability to make title. His words are as follows (p. 665) :

"What we, then, have to consider is, when a vendor, not by reason of any want of title, but by reason of not choosing to oust the mortgagor, refuses to complete, and the action is really for a breach of contract to deliver possession, whether, under such circumstances, the vendee is entitled to recover the difference between the contract price and the market value at the time of breach. We think the vendee is entitled to this difference. And, I may add, that we think this would be so in all cases of this kind, excepting those within the rule of Flureau *v.* Thornhill, which is confined to the single case of failure of title. . . . . We are far from wishing to throw any doubt on the decision in Flureau *v.* Thornhill ; it took place nearly a century ago, and there has been a long series of decisions since, and the practice of conveyancers has been founded upon it. But what is the doctrine laid down by that case ? Simply, that under a contract between vendor and purchaser of real estate, the vendor shall not be liable for any damages beyond the deposit and costs of investigating the title, when he is unable to perform his contract by reason of his inability to make out a good title. That has

been truly called an exception or qualification of the rule of common law (I need not go so far as to call it an anomaly), founded entirely on the difficulty that a vendor often finds in making a title to real estate, not from any default on his part, but from his ignorance of the strict legal state of his title. This was all that was decided in Flureau *v.* Thornhill, and we are far from dissenting from that proposition in the most extensive terms it can be laid down."

§ 1004. **Bain v. Fothergill—Present English rule.**—The English law was finally settled by Bain *v.* Fothergill.(a) In that case the defendants were in possession of a mining royalty, under a written agreement for a lease, of which they had taken an assignment from one H. One provision of H.'s agreement for a lease with the owners was, that he should not assign without their permission. The defendants entered into a contract with the plaintiff to sell their interest in the royalty, for the breach of which contract this action was brought. The owners were ready to consent to the assignment to the plaintiff, provided he would execute a duplicate of the agreement contained in this stipulation. One of the vendors knew this consent was necessary, the other did not. Since there had been (as was said by Mr. Baron Martin, in delivering the leading opinion of the court) no suggestion of bad faith in the defendants, and the learned barons being of opinion that the case came within the principle of Flureau *v.* Thornhill, gave judgment for the defendants. The case was then carried to the House of Lords, where the decision of the Exchequer was affirmed, it being held that the vendee could only recover nominal damages. Their lordships expressed their opinion that Flureau *v.* Thornhill was established law, that Hopkins *v.* Grazebrook was no longer law, that the rule of Flureau *v.* Thornhill applied to every case where the vendor failed

(a) L. R. 6 Ex. 59; L. R. 7 H. L. 158.

to convey through inability to make title, that that rule was the same whether the vendor had been guilty of fraud or not, for the motive of the defendant was immaterial in measuring the damages for breach of contract, that therefore even if there had been fraud, the vendee could not have recovered substantial damages, but must have proceeded in an action of deceit. The Lord Chancellor framed some questions which were put to the judges. They were: I. Whether upon a contract for the sale of real property, where the vendor, without his default, is unable to make a good title, the purchaser is by law entitled to recover damages for the loss of his bargain? II. Whether the actual possession of the property, the subject of the contract, is essential to bring the case within the rule laid down in Flureau *v.* Thornhill? III. Whether, if the rule of law is correctly laid down in Flureau *v.* Thornhill, the circumstances of the present case distinguish it and take it out of that rule? The answer to the first was, "That he is not entitled"; to the second, "No" and to the third, "No," by Kelly, C. B., Pollock and Pigott, BB., and Keating and Brett, JJ.; but by Denman, J., "Yes." Pollock, B., distinguished some of the cases as follows (p. 171): "In Hopkins *v.* Grazebrook, the vendor, when he contracted to sell, had substantially no estate, and the conditions of the sale contained a distinct undertaking to make a good title. . . . . In Robinson *v.* Harman, the defendant agreed to grant a valid lease when he well knew that he had no power to do so." He distinguished the rule in real property from that in personal property, saying (p. 173), that as to personal property the vendor knows his title and contemplates a resale, but "with real property the case differs in both these respects. First, no layman can be supposed to know what is the exact

nature of his title to real property, or whether it be good against all the world or not. . . . . Assuming that the vendor acts *bona fide*, the difficulty must be equally known to the vendee as to the vendor. Secondly, to enter into a contract for the purchase of land in order immediately to resell it before the title is examined, is unusual and exceptional." He continued: "It seems, therefore, more reasonable to treat the mere contract for the conveyance of land, not as based upon an implied warranty that the vendor has power to convey, but as involving the condition that the vendor has good title." He then distinguished this case from Hopkins *v.* Grazebrook and similar cases, on the ground that here the defendants acted in good faith, and the contract did not fail because the defendants overlooked any fact "which might, and in the event did, prevent them from making a good title." Denman, J., took, as we have said, the opposite view, holding that this case was not governed by Flureau *v.* Thornhill, which he limited in these words: "I must, however, at once add that the rule laid down in Flureau *v.* Thornhill is, in my opinion, more limited in its operation than might be contended for, upon several possible constructions of the words, 'without his fault, unable to make a good title.'" Blackstone, J., he said, did not mean to include the case of an intending vendor, *knowing* that he had not a good title. He distinguished Hopkins *v.* Grazebrook from Flureau *v.* Thornhill on the grounds: First, that there the agreement was that the vendee, on payment, should be let into possession; second, that the vendor undertook to make a good title; and third, that the defendant knew he was selling on an expectation merely. The decision in Hopkins *v.* Grazebrook amounted, he said (p. 181), "to no more than a decision that mere inability to make a good

title does not of itself bring a vendor within the rule laid down in Flureau *v.* Thornhill as to damages; but that it depends upon the nature of the contract and also upon the reasons for the inability." He quoted several times the remarks of Mr. Justice Williams in Pounsett *v.* Fuller,(a) *supra:* "Ignorance of law is not that sort of misconduct which brings the case within the rule in Hopkins *v.* Grazebrook." He stated the distinction between the two courses of decision to depend on the question whether the defendant did or did not *bona fide* believe that he had a selling right. He then proceeded to distinguish the case at bar from Flureau *v.* Thornhill, saying (p. 186): "I think that the contract did not in this case go off through the discovery by the defendants that they could not make a good title, but by reason of the over-sanguine expectation on the part of Mr. Fothergill that an obstacle which he *knew* to exist, and over which he had no control, would somehow or other cease to exist before the completion of the purchase." The opinions in the House of Lords were delivered by Lords Chelmsford and Hatherly. We quote from Lord Chelmsford (p. 201); "Now, the rule established by Flureau *v.* Thornhill is that upon a contract for the purchase of real estate, if the vendor, without fraud, is incapable of making a good title, the intended purchaser is not entitled to any compensation for the loss of his bargain." He continued (p. 202): "The fancied goodness of the bargain must be a matter of a purely speculative character, and in most cases would probably be very difficult to determine in consequence of the conflicting opinions likely to be formed upon the subject; and even if it could be proved to have been a beneficial purchase, the loss of the pecuniary advantage to be derived from

(a) 17 C. B. 660, 682.

a resale appears to me to be a consequence too remote from the breach of the contract." Referring to Engel *v.* Fitch, he said (p. 203): "Now, although the purchaser in Engel *v.* Fitch, when he entered into the contract, may have contemplated a resale at an advance, it is not at all likely that the loss of this profit should have occurred to the vendor as the probable result of the breach of his contract." . . . . (p. 204): "The decision itself in Hopkins *v.* Grazebrook cannot be supported. The seller in that case had undoubtedly an equitable estate in respect of which he had a right to contract." He expressed his dissent (p. 206) from that case and the limitation it had been supposed to introduce that "in an action for breach of a contract for the sale of a real estate, if the vendor at the time of entering into the contract knew that he had no title, the purchaser has a right to recover damages for the loss of his bargain," and added: "I quite agree that the distinction as to damages in cases of contracts for the sale of real estate, where the vendor acts *bona fide* and where his conduct is tainted with fraud or bad faith, is not to be justified or explained on principle." He quoted with approval Mr. Justice Blackburn in Sikes *v.* Wild, and Lord St. Leonards.[a] He continued (p. 207): "Upon a review of all decisions on the subject, I think that the case of Hopkins *v.* Grazebrook ought not any longer to be regarded as an authority. If a person enters into a contract for the sale of a real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit." At all events, the case, he said (p. 208),

[a] Sugden on Vendors, 360, 361.

was within Flureau *v.* Thornhill, for the defendants had an equitable title, and supposed that their title was complete. They were prevented from completing by an unexpected defect. Lord Hatherly, in his judgment, declared that Flureau *v.* Thornhill could not be overruled. He distinguished Engel *v.* Fitch, saying (p. 209): "The vendor in that case was bound by his contract, as every vendor is bound by his contract to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest and also by force of the interest of others whom he can compel to concur in the conveyance." He stated the reason of Flureau *v.* Thornhill as follows (p. 210): "Therefore, the reason is not that the contract is made upon that condition, but the foundation of the rule has been already more clearly expressed by my noble and learned friend who has preceded me in saying, that having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estate, it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor, and taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made if, in effect, it should turn out that the vendor is incapable of completing his contract in consequence of his defective title."([a])

This case carries out the doctrine of Flureau *v.* Thornhill to its fullest extent, and it establishes as law that

([a]) The case of Bain *v.* Fothergill was followed in Rowe *v.* School Board for London, 36 Ch. D. 619.

wherever the vendor at the time of performance has no title to the land, and on that ground refuses to perform, he will not be liable for the loss of his bargain. It sustains the principle that fraud can never change the rule of damages in actions on contract. It will be noticed that in this case it is said that the rule of Flureau *v.* Thornhill applies in every instance where the contract fails because of the vendor's inability to make title. It might be urged that "unable to make title" is not necessarily synonymous with "having no title." This view might receive some encouragement from Lord Hatherly's remarks in distinguishing Engel *v.* Fitch, to the effect that that case is to be distinguished on the ground that there the defendant would not spend money to get a conveyance. We do not, however, think this view is tenable. Unless the construction "having no title" is given to the clause "unable to make title," the clause must mean that Flureau *v.* Thornhill only applies where the vendor is absolutely unable by any means to obtain a title. If that were the rule, very few cases would be brought within Flureau *v.* Thornhill, for in most cases the vendor could obtain a good title, or perfect his existing title by a liberal expenditure of money. As to the validity of the distinction thus laid down by Lord Hatherly, with reference to Engel *v.* Fitch, it seems to involve only a principle which is admitted on all hands, that the vendor is bound to do the necessary acts which constitute the transaction of conveyance, and where he refuses to do what Lord Hatherly called "a matter of conveyancing and not a matter of title," he must pay substantial damages.

We have deemed it proper to go into this extended review of the authorities, because the subject is one of the most important in the law of damages, and in those

jurisdictions in this country where the rule of Flureau *v.* Thornhill is adopted, the law is in a very unsettled condition. The rule in Flureau *v.* Thornhill is admitted on all hands to be an exception to the general rule as to the measure of damages on breach of contract, viz., that the plaintiff shall be put in the same position as if the contract had been performed. The reason for that exception, it has been seen, is not agreed upon, nor is the exception everywhere admitted as law.

§ 1005. **General considerations.**—There are some remarks of Lord Chelmsford, which it is important to notice. He said that the fancied goodness of the bargain must be of a purely speculative character, and that the gain by a resale is so remote a consequence that it cannot be deemed to have entered into the contemplation of the parties. If this is meant to be a remark applicable to all sales of real property, it may be questioned. As to its being too speculative, the difference is only one of degree between sales of real estate and sales of stock. Yet, in the latter case, the rule of law is well settled that the measure is the difference between the contract price and the market value. It is true that it is often difficult to determine the market value, but it can, in the case of real as of personal property, be determined by a comparison of sales of property nearly similar in the situation and quality of the land. As to the suggestion that a gain by a resale is not within the contemplation of the parties, this might possibly have been true in early times, but it is not true now. Undoubtedly, the profit the purchaser would have made, on any particular resale, would be too remote; but he ought to recover a profit he could have made by a resale in the market, which would be the market price. But it may be questioned whether even if this were so, sub-

stantial damages could not be recovered. The vendee might at least recover the annual profits he would have made by owning the land, in excess of the interest on his purchase-money, for if a resale was not within the contemplation of the parties, a possibility of profits must have been. These profits should be determined in bulk, and the result would generally be the market value, for that is founded chiefly on the value of the yield of the land. For instance, to determine the damage by loss of profits, if the annual net yield was $70, and the purchase-money was $1,000, and the rate of interest were 5 per cent., the profits per year would be $20; but, in a lump sum, the value of land which produced $70 would be $1,400. Probably the market price would be lower in this country, but this would be near it, and *vice versa*, the market price would help to determine the value of the profits in bulk. The plaintiff should recover $400 in such a case. Of course, in determining market value there may be other conditions which would change this rule, for instance, the fact that the property promised to become more valuable; but the very fact that those possibilities are taken into account in determining the market price would seem to imply that they are in the contemplation of the parties in making contracts for the sale of land.

But the question of what the purchaser intends to do with the property is totally irrelevant to the measure of damages. The measure of damages for the breach of any contract of purchase, whether it relate to land or chattels, is the difference between the contract price and the *value of the thing purchased.* And this is wholly unaffected by what the purchaser intends to do, or does with it afterwards. He may buy it to keep or to sell again, or merely that he may destroy it. The measure

of damages always remains the same. His intention, if known to his vendor, may add to this measure of recovery, consequential damages under the rule of Hadley *v.* Baxendale ; but the least that he is entitled to recover, the normal measure of damages is always the value of his bargain. It seems very objectionable to lay down a rule based on an assumption that a person who has acquired a right against another of absolute ownership in a thing, will probably exercise it in some particular way. By doing so, he is deprived of part of the very right he has acquired. To attempt to found anomalous rules upon general assumptions of this sort is likely to breed confusion as to the principles which underlie the subject.

§ 1006. **Exceptional cases—Vendor refuses to convey being able to do so.**—It is to be observed that Flureau *v.* Thornhill is universally held not to apply in all cases of breach of contract to convey land. Thus it is everywhere the law that *the vendor is liable in substantial damages if having the means of completing his title he refuses, or puts it out of his power, to do so.* In Williams *v.* Glenton [a] Turner, L. J., said (p. 209): "The vendor is bound to complete the contract ; and heavy damages would be given if, having the means of completing the sale, he should decline to take the proceedings necessary for that purpose." In Engel *v.* Fitch, *supra*,[b] where the vendee refused to accept the title when a mortgagor was in possession, and the vendor having a good title refused to complete because he did not wish to go to the expense of ousting the mortgagor, this rule was properly adopted. In Bain *v.* Fothergill, *supra*,[c] Lord Hatherly,

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[a] L. R. 1 Ch. App. 200.
[b] L. R. 3 Q. B. 314 ; 4 id. 659.
[c] L. R. 7 H. L. 158, 209.

commenting on Engel *v.* Fitch, said: "Every vendor is bound by his contract to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest and also by force of the interest of others whom he can compel to concur in the conveyance." It will be noticed that this is another exception to ordinary rules. In the common case of a breach of contract, no inquiry is made into the facilities for performance possessed by the contracting party, nor into the wilfulness of the breach. But an anomalous rule with regard to real estate having been established, a second anomaly is needed to correct it.

This principle seems also to be well established in this country in all cases where the excuse is not want of title.(a) Where, therefore, the vendor refuses to convey because he has, between the time of the contract and of performance, sold the property, he will be liable for substantial damages.(b) In an action on a bond to convey within a stipulated time certain lands to be selected by the plaintiff's intestate, where it proved that the lands had been sold when the obligee applied for the conveyance, the measure of damages was held to be the value of such land as the obligee might have selected.(c) The principle was applied where the defendant's failure to convey

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(a) Sweem *v.* Steele, 5 Ia. 352; Graham *v.* Hackwith, 1 A. K. Marsh 423; Western R.R. Co. *v.* Babcock, 6 Met. 346; Warner *v.* Bacon, 8 Gray 397; New Haven & N. R.R. Co. *v.* Hayden, 117 Mass. 433; Allen *v.* Atkinson, 21 Mich. 351; Noyes *v.* Phillips, 60 N. Y. 408; Pringle *v.* Spaulding, 53 Barb. 17; Dustin *v.* Newcomer, 8 Oh. 49; Barbour *v.* Nichols, 3 R. I. 187; Plumer *v.* Simonton, 16 Up. Can. Q. B. 220.

(b) Tracy *v.* Gunn, 29 Kas. 508; Wilson *v.* Spencer, 11 Leigh 261; Pierce *v.* Small, 10 Up. Can. C. P. 161.

(c) Loomis *v.* Wadhams, 8 Gray 557.

was due to the fact that the land was sold on execution by the sheriff.(a)

§ 1007. **Vendor contracts with reference to complete title.**— It is also everywhere held that *the vendor is liable in substantial damages if he has contracted expressly with reference to the completeness of the title.* In Taylor *v.* Barnes (b) the defendant had transferred to the plaintiff a certificate for certain land, and had agreed to procure a good title for him by making certain payments. It was held that on the defendant's failure to make these payments the measure of damages was the value of the land at the time of the eviction or other breach of contract, with interest from that time. Allen, J., said, in reference to the rule limiting the damages to the consideration: "But it is not applied in cases of executory contracts, where the vendor has sold lands to which he has not a perfect title, and where he undertakes to complete and perfect it. In this case there is an expressed agreement for indemnity; and a recovery which does not give the vendee the benefit of his bargain, and the value of his purchase, does not indemnify him against loss." There was in this case an express agreement to hold the plaintiff free from loss through any breach by the defendant. So where there is a covenant to indemnify the vendees in case of failure of title for increase of value of the real estate, the rule of damages in case of such increase in value against bargainors who have put it out of their power to convey according to their contract, is the difference in value between the value of the land when the conveyance should have been made, and the sum agreed

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(a) Sawyer *v.* Warner, 36 Ia. 333; Kirkpatrick *v.* Downing, 58 Mo. 32; Nichols *v.* Freeman, 11 Ired. 99.

(b) 69 N. Y. 430.

to be paid for it.(a) This is generally the rule where the agreement is in terms to procure a title from a third party.[1] (b)

§ 1008. **General rules of American law.**—In this country the courts are not altogether in harmony, but four distinct theories are held in the various jurisdictions. In one jurisdiction the English rule finally adopted in Bain *v.* Fothergill, is adhered to, and it is held that nominal damages only can be recovered in an action upon the contract in case of failure of title, notwithstanding the defendant did not act in good faith ; in other States the recovery of substantial damages depends upon the fraud, bad faith, or other misconduct of the defendant. In still other States, in order to recover substantial damages, the plaintiff need not show misconduct ; *knowledge* on the part of the vendor of inability to make title is enough, while in still other jurisdictions the contract under consideration is not regarded as exceptional, and damages for loss of the bargain may always be recovered. We now proceed to examine the theories held in the various jurisdictions in detail.

§ 1009. **The rule of nominal damages.**—In Pennsylvania *the vendor is liable in nominal damages only, if he fails to convey because he has not a good title.* This is the extreme rule adopted by the House of Lords, in Bain *v.* Fothergill (*supra*). It expressly applies to cases of fraud, and to cases where the vendor contracts knowing he has no title, as well as to cases of colorable title and of flaws subsequently discovered. It is supposed to be founded

[1] Pinkston *v.* Huie, 9 Ala. 252 ; Dyer *v.* Dorsey, 1 Gill & J. 440 ; Gibbs *v.* Jemison, 12 Ala. 820.

(a) Hall *v.* Delaplaine, 5 Wis. 206.

(b) Gale *v.* Dean, 20 Ill. 320 ; Plummer *v.* Rigdon, 78 Ill. 222 ; Vallier *v.* Walsh, 6 Up. Can. C. P. 459. But see Beard *v.* Delany, 35 Iowa 16.

on the rule laid down by Blackstone, J., in Flureau *v.* Thornhill, where he states that contracts for the sale of land are founded on the implied condition, that "the vendor has a good title."[a] An objection urged against this rule is, that it carries Flureau *v.* Thornhill further than its principle requires. If the principle of that case is that a vendor should be excused from performing where he discovers unexpected flaws in his title, because of the involved state of the system of conveyancing, then, where he knew, at the time of making the contract, that he had no title, he should not be protected by that decision, for the flaws are not unexpected, and not being then within the principle, he should not be within the authority of the rule.

This rule is apparently adopted to the full extent in Pennsylvania, where it is held that, although the vendor knows he has no title, or, it seems, even if he is guilty of fraud, he is liable only for the consideration, if paid in advance, and the expenses to which the vendee has been put. In Burk *v.* Serrill,[b] the defendant contracted to

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[a] "That is the true and only principle upon which Flureau *v.* Thornhill can be supported," said the English Court of Common Pleas, after citing the above language, "namely, that the parties have tacitly agreed that this should be understood as a term of the bargain between them." Lock *v.* Furze, L. R. 1 C. P. 441, 454.

[b] 80 Pa. 413; *acc.* McCafferty *v.* Griswold, 99 Pa. 270. There have been earlier cases of a different tenor. In McNair *v.* Compton, 35 Pa. 23, it was held error to charge that the vendee could, if there was no fraud, recover the difference between the contract price and the value, and the court laid down the rule that, if there is no fraud, only the consideration can be recovered; if there is fraud, the vendee should, in addition, be compensated for all his expenses, but not for loss of his bargain. In Meason *v.* Kaine, 67 Pa. 126, though the court said that, if there is no fraud, the vendee should recover the actual loss sustained, yet it qualified this statement by specifying as elements of damage the payment of money, expenses incurred on the faith of the bargain, and loss in labor. These decisions are not strictly in point, the contracts being unenforceable under the statute of frauds. See Ellet *v.* Paxson, 2 W. & S. 418; Dumars *v.* Miller, 34 Pa. 319; Bowser *v.* Cessna, 62 Pa. 148.

convey by good deed certain lands. His wife refused to join in the conveyance, so that he could not complete his contract. It was held that the plaintiff could not recover for the loss of his bargain. It will be seen that the facts are closely analogous to those in Sikes *v.* Wild. The judge at *nisi prius* charged that the plaintiff generally, under such circumstances, could only recover what he had paid ; but if there was fraud, he could recover for all the loss he had suffered. He continued : " But where there is a wanton or dishonest refusal to perform the contract, or where the covenantor, by some fraudulent act on his part, renders its performance impossible, as when, by collusion with his wife, or by request on his part, she refuses to sign the deed ; or where her refusal is not her own free and uncontrolled act, but made at the implied or actual request of her husband, the law in such a case awards full compensatory damages, and permits a recovery for all the party has lost by reason of the default of the other party, including the value of the bargain, and all injury and damage he may have suffered by reason of any act of his made upon the faith of the broken covenant." Further on, he said that, if there was fraud, the vendee could recover full damages. On appeal, this was held erroneous, and the court characterized such damages as exemplary damages, and therefore not allowable in such a case. Gordon, J., assumed, in his opinion, that the plaintiff recovered greater damages than the value of the land, so this decision does not necessarily establish that fraud will not change the rule, though the report of the facts would imply the contrary.

§ 1010. **Substantial damages in case of bad faith.**—The second rule is, that if the defendant fails to convey because he has not a good title, he is not liable for the value of the bargain *unless fraud or bad faith is shown.* This rule

prevails in this country more extensively than the rule last stated. It cannot be supported on the ground that fraud or misrepresentation changes the rule of damages on breach of contract, for no such principle has ever been recognized. The grounds on which, if at all, it must be supported are that Flureau *v.* Thornhill is an exception which should not be extended to protect those who have been guilty of fraud, or that Flureau *v.* Thornhill was limited, by the decision itself, to cases of good faith.

In Kentucky it was early held by the Court of Appeals, that on a covenant to convey, where the vendor is *without fraud* incapable of making a title, the rule of damages is the purchase-money, with interest from the time it was paid; and the court approved the case of Flureau *v.* Thornhill.[1] And again, "when there is a fraudulent refusal to convey, less damages than the value of the land, at the time the conveyance ought to have been made, should never be given."[2] In Davis *v.* Lewis,([a]) which was an action on a bond conditioned to convey a tract of land, it was held, that if no fraud is shown the consideration alone can be recovered.

So in New York, *where the covenantor had acted in good faith, and refused to convey because his title had in part failed, the plaintiff insisted that he was entitled to recover the increased value of the land on the day when the deed was due, beyond the contract price. It was

[1] Allen *v.* Anderson, 2 Bibb 415. In a case where the vendor fraudulently sold land, to which he knew he had neither a good title nor claim, it was held by the Court of Appeals in *equity*, that the value of the land should be fixed at what it was worth at the time of impanelling the jury. M'Connell *v.* Dunlap, Hardin 41. And the principle was recognized in Patrick *v.* Marshall, 2 Bibb 40; and Fisher *v.* Kay, 2 Bibb 434. These are all in *equity*, however.

[2] Handley *v.* Chambers, 1 Litt. 358.

([a]) 4 Bibb 456. In Rutledge *v.* Lawrence, 1 A. K. Marsh. 396, it was said that if there was no fraud, the vendee could recover the value of the land at the time of the sale, but if there was fraud a different rule might prevail. See Goff *v.* Hawks, 5 J. J. Marsh. 341.

held that where the vendor acted *in bad faith*, the plaintiff would be entitled to recover, by way of damages, the difference between the contract price and the enhanced value when the conveyance should have been made; but that in a case of *good faith*, the contract price would be considered conclusive, and the plaintiff having paid nothing could recover nothing.[1] Where the defendant, in consequence of a defect in his title, failed to comply with his contract to convey certain property, the plaintiff, who was to pay on the delivery of the deed, had advanced nothing, but he had removed to the property and done some work on it; and in the declaration he claimed to recover his expenses of removing, and also his labor. No bad faith was alleged or pretended. The judge who tried the cause, told the jury that if the defendant wilfully and designedly neglected to convey, the plaintiff was entitled to recover all the damages which he had sustained by the breach of his contract; but that, unless the non-performance was wilful and intentional, the plaintiff was entitled to nominal damages only; that if the omission to convey was accidental or inadvertent, and the defendant had fairly tendered him all the title he could make, the plaintiff could not recover any of the special damages. A verdict was found for nominal damages; and, on exceptions, this was held right.[2] ** In Conger *v.* Weaver ([a]) it was said

[1] Baldwin *v.* Munn, 2 Wend. 399. The language of the court was as follows: "If the vendor acts in bad faith, and refuses to convey because the property has increased in value, and with a view of putting the enhanced value in his own pocket, it becomes a case of fraud, and the plaintiff would clearly be entitled either to compel a specific performance in equity, or to recover, by way of damages, the difference between the contract price and the enhanced value when the conveyance should have been made."

[2] Peters *v.* M'Keon, 4 Denio 546. The court said: "On an executory contract for the sale of lands which the vendor believes to be his own, and where there is no fraud on his part, if the sale falls through in consequence of a defect of title, the measure of damages is substantially the same as it is in the case of an executed sale," or on the covenants for seizin and for quiet enjoyment. See the authorities collected and referred to in Fletcher *v.* Button, 6 Barb. 646.

([a]) 20 N. Y. 140.

that nominal damages only could be recovered for the vendor's breach of a contract to convey land made in good faith, if such breach was occasioned simply by honest inability to make a good title.(a) The leading case in New York following this principle is Margraf *v.* Muir.(b) The defendant, a widow, agreed to sell to the plaintiff, for a very small sum, land which had belonged to her husband, the plaintiff concealing from her its real worth. Her children (some of whom were minors) had an interest in the land, and the approval by the court, of a sale of their interests, was necessary. The land had at the time been sold for non-payment of taxes. The defendant did not know, but the plaintiff did, that it had been sold for taxes, and that the approval of the court would be necessary. It was held that the plaintiff could only recover nominal damages. Earl, C., delivered the opinion of the Commission of Appeals. Referring to the rule of Flureau *v.* Thornhill, he said: "But to this rule there are some exceptions based upon the wrongful conduct of the vendor, as if he is guilty of fraud, or can convey, but will not, either from perverseness or to secure a better bargain, or if he has covenanted to convey when he knew he had no authority to contract to convey, or where it is in his power to remedy a defect in his title, and he refuses or neglects to do so, or when he refuses to incur such reasonable expenses as would enable him to fulfil his contract. In all such cases the vendor is liable to the vendee for the loss of the bargain under rules analogous to those applied in the sale of personal property." He then said that this case was within the rule of Flureau *v.* Thornhill,

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(a) *Acc.* Northridge *v.* Moore, 118 N. Y. 419 (*semble*); Walton *v.* Meeks, 120 N. Y. 79.

(b) 57 N. Y. 155.

for there was no fraud practiced on the vendee, since he knew the vendor could not convey.

In Iowa, a rule somewhat similar has been laid down. "If the person selling is honest," said the court, in Sweem *v.* Steele,[a] "and is prevented from making the conveyance by unforeseen causes, and which he could not control, the plaintiff should recover only nominal damages. If he has paid the price or any part thereof, then, of course, in such a case, he should recover that sum with interest. But if the person selling is in fault, and either did or should have known that he could not comply with his undertaking, or, having the title, refuses to convey, or having the title at the time of the agreement, afterwards disables himself from completing it by a sale to a third person, or at the time of the agreement knew he had no title,—in these, and in all cases where the inability arises from fraud in the covenantor, the purchaser should recover substantial damages, including compensation for any actual loss, as by the increased value of the land to the time when the contract should have been executed." [b] This reasoning holds true, in Iowa, even when the contract was to procure title from a third person, who refuses to convey.[c]

This rule has been followed in several jurisdictions in this country.[d] In such jurisdictions, where lands were

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[a] 5 Ia. 352; S. C. 10 Ia. 374.

[b] *Acc.* Foley *v.* McKeegan, 4 Ia. 1, where it is said that the measure of damages depends on the cause of the failure, and that the fault of the defendant is the important element; Stewart *v.* Noble, 1 Greene (Ia.) 26.

[c] Sawyer *v.* Warner, 36 Ia. 333; Yokom *v.* McBride, 56 Ia. 139. But see Donner *v.* Redenbaugh, 61 Ia. 269, which suggests a doubt whether if wife refuses to join in conveyance, defendant is liable for more than nominal damages or consideration.

[d] Sanford *v.* Cloud, 17 Fla. 532; Tracy *v.* Gunn, 29 Kas. 508; Baltimore P. B. & L. Society *v.* Smith, 54 Md. 187 (explaining Cannell *v.* M'Clean, 6 H. & J. 297; and, it would seem, overruling Marshall *v.* Haney, 4 Md. 498);

to be exchanged, the measure of the plaintiff's damages, if he has made his conveyance, is the value of the land he has conveyed.([a])

In one class of cases where the plaintiff has paid the purchase-money and gone into possession, and the defendant afterwards refuses to convey, and the defendant claims to decrease the amount of recovery by the rents and profits, it has been held that the plaintiff can recover, at law, the whole amount of the purchase-money.([b]) These cases, it will be seen, do not involve an approval of Flureau *v.* Thornhill; for no more than the purchase-money is claimed.

§ 1011. **In case of knowledge that title is in third party.**— Where the defendant knew at the time of the contract that the title was in a third party, some courts have held him liable in substantial damages, even if he had a reasonable expectation of securing the title of the third party. A leading case in New York has followed this principle. In Pumpelly *v.* Phelps([c]) a trustee authorized to sell land only on the written consent of the *cestui que trust*, was told by her that he need not consult her about the sale of any of the land belonging to the trust

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Johnson *v.* Hamilton, 36 Tex. 270; Thompson *v.* Guthrie, 9 Leigh 101; McKinnon *v.* Burrows, 3 Up. Can. Q. B. (O. S.) 590.

([a]) Burr *v.* Todd, 41 Pa. 206.

([b]) Combs *v.* Tarlton, 2 Dana 464; Seamore *v.* Harlan, 3 Dana 410; Herndon *v.* Venable, 7 Dana 371; Dunnica *v.* Sharp, 7 Mo. 71.

([c]) 40 N. Y. 59. See the same case below, *sub nom.* Brinckerhoff *v.* Phelps, 24 Barb. 100; 43 Barb. 469. In Margraf *v.* Muir, 57 N. Y. 155, 160, Earl, C., distinguished Pumpelly *v.* Phelps, saying, that in that case "the vendee did not know that the vendor had no title," and also on the ground that the vendor in the case at bar could not have given the title called for because of the tax title, of which she did not know. As we understand the case of Margraf *v.* Muir, the widow, when she made the contract, believed that she had a right to convey, and, therefore, the decision cannot be said to be opposed to the rule of Pumpelly *v.* Phelps. Mr. Commissioner Earl seems, nevertheless, to disapprove of that rule.

estate, but might confer with her husband on the subject, and she would assent to what they should agree upon. Accordingly the defendant, with the concurrence of the husband, made an agreement in good faith for the sale to the plaintiff, not suspecting in doing so any unwillingness on her part to assent to it, but believing she would assent. She had, in fact, in many previous instances, assented to the conveyance of parcels of land included in the trust, and had in no case objected to what her husband and the defendant thought proper to be done, but in this instance she subsequently refused her consent. Mr. Justice Mason, in delivering the opinion of the majority of the court, made the following observations (p. 66):

"The general rule certainly is, that where the vendor has the title, and for any reason refuses to convey it, as required by his contract, he shall respond in law for the damages, in which he shall make good to the plaintiff what he has lost by his bargain not being lived up to. This gives the vendee the difference between the contract price and the value at the time of the breach, as profits or advantages, which are the direct and immediate fruits of the contract. Where, however, the vendor contracts to sell and convey in good faith, believing he has a good title, and afterward discovers his title is defective, and for that reason, without any fraud on his part, refuses to fulfil his contract, he is only liable to nominal damages for a breach of his contract. The rule is otherwise, however, where a party contracts to sell lands, which he knows at the time he has not the power to sell and convey, and if he violates his contract in the latter case, he should be held to make good to the vendee the loss of his bargain, and it does not excuse the vendor that he may have acted in good faith, and believed, when he entered into the contract, that he should be able to procure a good title for his purchaser."

Accordingly, the ruling below, that the plaintiff was entitled to recover as damages the difference between the value of the land and the price to be paid for it, was

affirmed. It will be observed that the circumstances of this case were like those of Sikes *v.* Wild,[a] except that in the present case, by the terms of the trust, the trustees could make no conveyance without the assent of the *cestui que trust*, and, in the former, the trustees held the equitable fee, and could make a good title to it, subject to the incumbrance by which the widow's annuity was secured.

It is not in harmony with principles that have been announced in the utterances of other judges in New York, but it is not in conflict, considered as a decision upon certain facts, with any other precedents of the Court of Appeals. In Bush *v.* Cole,[b] where an auctioneer sold land without any authority to do so, it had been held that he was liable for the value of the bargain; and Balcolm, J., had said that if a vendor contracted to sell land to which he had no color of title, or perversely refused to perform when there was no obstacle, or sold without authority, he would be liable for full damages. In Conger *v.* Weaver,[c] the vendor apparently believed he had a right to convey, which would limit the recovery to nominal damages, under the rule in New York, and the decision is therefore not inconsistent. In Trull *v.* Granger,[d] which was an action for breach of contract to lease premises, it was held that the measure of damages was the difference between the rent reserved and the value of the premises. Pumpelly *v.* Phelps was followed in Heimburg *v.* Ismay.[e]

There are some remarks of Rapallo, J., in Leggett *v.*

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[a] 1 B. & S. 587.
[b] 28 N. Y. 261.
[c] 20 N. Y. 140.
[d] 8 N. Y. 115.
[e] 35 N. Y. Super. Ct. 35.

Mutual Life Insurance Co.,[a] in which he refers to the rule of Conger *v.* Weaver, with approval, but they do not seem to be intended to throw any doubt on Pumpelly *v.* Phelps. In Cockcroft *v.* N. Y. & H. R.R. Co.,[b] the contract was to convey free of incumbrances. The defendants discovered subsequently two mortgages of which they had previously been ignorant. They were thus prevented from completing their contract. It was held that only nominal damages were recoverable. Miller, J., in delivering the opinion of the court, pointed out that the decision was consistent with those decisions which hold good faith to be the material question.

In New Jersey this rule is adopted. Where a vendor agreed to furnish a title in fee-simple free from incumbrances, and his wife refused to sign the deed, it was held in an action for breach of this contract, that as the vendor knew at the time of entering into the contract that it was doubtful whether he could fulfil it, since his ability to do so depended upon his wife's consent, the purchaser was held entitled to substantial damages for the loss of his bargain.[c] The same rule was adopted in Stephenson *v.* Harrison.[d] In Plummer *v.* Rigdon,[e] a vendor, knowing at the time he made the contract that he had no title, was held liable in substantial damages.

In Hammond *v.* Hannin,[f] the defendant had contracted for the purchase of lands from a third party. He then made a contract with the plaintiff. He subsequently discovered that the third party could not con-

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[a] 53 N. Y. 394.

[b] 69 N. Y. 201.

[c] Drake *v.* Baker, 34 N. J. L. 358.

[d] 3 Litt. (Ky.) 170.

[e] 78 Ill. 222.

[f] 21 Mich. 374, 389.

vey. It was held error for the judge to have charged that the plaintiff could recover substantial damages. Cooley, J., reviewing the cases, said that Flureau *v.* Thornhill must be taken to be established law, but that where the vendor assumed to sell what he did not own, or acted in bad faith, substantial damages should be allowed. As to the case at bar, he went on to say: "It is true the vendor understood that he had not yet obtained the legal title, but he is assumed to have supposed he had the equitable title, and a right to compel the conveyance of a legal title. . . . . The general principle does not depend on whether the vendor's supposed title was a legal one or not."

§ 1012. **Substantial damages always recoverable—General rule in America.**—*If the defendant fails to convey because he has not a good title, he is always liable in substantial damages.* This is commonly called the United States Supreme Court rule, and represents one extreme of the series of principles of which the highest English court has adopted the other extreme. It seems to be the correct one on principle. It may be said in its favor that it is unjust to hold the vendee to his contract to pay, if, before the contract is to be performed, the land decreases in value, while, if it increases in value, the vendor is liable only for nominal damages; that it is the object of courts of justice to carry out the contracts of parties, or to put them in the same position as if the contract had been carried out; that if the vendor wished to protect himself from liability for a latent defect in his title, he could easily have done so in his contract, and if he chose to agree absolutely to convey, he should be held responsible for his failure, since the promisee was entitled to change his position on the faith of the agreement.

The leading case is Hopkins *v.* Lee,[1] in which the court said :

"The rule is settled in this court, that in an action by the vendee for a breach of contract on the part of the vendor for not delivering the article, the measure of damages is its price at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any ; otherwise the vendor, if the article have risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket. Nor can it make any difference in principle whether the contract be for real or personal property, if the lands, as is the case here, have not been improved or built on. In both cases the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld, the vendor ought to make good to him the difference. This is not an action for eviction." [2]

This rule is now the prevailing one in the United States.(a) In Lawrence *v.* Chase (b) the defendant agreed

[1] Hopkins *v.* Lee, 6 Wheat. 109, 118.

[2] In Baldwin *v.* Munn, 2 Wend. 399, 407, speaking of this case, Sutherland, J., said : " It will be perceived that this was substantially a case of exchange of lands. Very different considerations may be applicable to such a case from the ordinary case of a mere failure to convey where the consideration money has not been paid."

(a) Whiteside *v.* Jennings, 19 Ala. 784; Kempner *v.* Cohn, 47 Ark. 519; Wells *v.* Abernethy, 5 Conn. 222; Bryant *v.* Hambrick, 9 Ga. 133; Irwin *v.* Askew, 74 Ga. 581; Gale *v.* Dean, 20 Ill. 320; Lewis *v.* Lee, 15 Ind. 499; Case *v.* Wolcott, 33 Ind. 5, (overruling Blackwell *v.* Lawrence Co., 2 Blackf. 143); Duncan *v.* Tanner, 2 J. J. Marsh 399; Doriocourt *v.* Lacroix, 29 La. Ann. 286; Robinson *v.* Heard, 15 Me. 296; Russell *v.* Copeland, 30 Me. 332; Loomis *v.* Wadhams, 8 Gray 557; Brigham *v.* Evans, 113 Mass. 538; Skaaraas *v.* Finnegan, 31 Minn. 48 (*semble*); Lee *v.* Russell, 8 Ired. 526; Nicholl *v.* Freeman, 11 Ired. 99; Barbour *v.* Nichols, 3 R. I. 187; Hopkins *v.* Yowell, 5 Yerg. 305; Shaw *v.* Wilkins, 8 Humph. 647, 653; Clarke *v.* Locke, 11 Humph. 300 (*semble*); Dunshee *v.* Geoghegan, 25 Pac. Rep. 731 (Utah); Cade *v.* Brown, 25 Pac. Rep. 457 (Wash.); Muenchow *v.* Roberts, 46 N. W. Rep. 802 (Wis.). In Newsom *v.* Harris, Dudley (Ga.) 180, an action on a bond to make titles to land, a breach was proved, and the question was as to the measure of damages. The plaintiff gave three hundred

(b) 54 Me. 196.

to reconvey a farm to the plaintiff. He conveyed it to a third party and refused to complete his contract with the plaintiff when called upon. It was held that the plaintiff could recover the value of the farm. In another case in Maine, Doherty *v.* Dolan,[a] the whole question was reviewed and the rule of Hopkins *v.* Lee adopted. The measure of damages was declared to be the excess of the value of the land at the time of the breach over the amount owed by the vendee on his contract, and that this rule held good although the defendant was disabled from conveying by discovering incumbrances which he had known nothing of. Flureau *v.* Thornhill was disapproved. Peters, J., said:

"We think the rule we are disposed to adhere to, as adapted to all cases, a reasonable one. The pecuniary damages are the same to the vendee, whether the motive of the vendor in refusing to convey is good or bad. . . . . The vendor is strongly tempted to avoid his agreement, where there has been a rise in the value of the property. . . . . The vendor can provide in his contract against such a contingency as an unexpected inability to convey. He can also liquidate the damages by agreement."

So where lands were to be exchanged, the plaintiff having conveyed, recovers the value of the land he was to get;[b] and where he has not conveyed, the difference

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dollars for the land, and the defendant sold it for six hundred dollars. The verdict was for the price paid for the land by plaintiff; and the question argued was, whether the price paid with interest or the value at the time of the breach, was the true measure of damages. The court adopted the latter rule, and set aside the verdict. In a peculiar case in Tennessee, where one got up void proceedings in partition under which a sale was had, it was held that the purchaser's measure of damages against him, whether the intention had been fraudulent or not, was in either case the consideration money and interest. Key *v.* Key, 3 Head 448.

[a] 65 Me. 87, 91.

[b] Wells *v.* Abernethy, 5 Conn. 222; Devin *v.* Himer, 29 Ia. 297; Greenwood *v.* Hoyt, 41 Minn. 381.

in value of the two parcels.(a) And where the land was to be paid for in labor, the measure of damages is the difference in value of the labor and services.(b) Where land was to be conveyed in settlement of litigation, and the settlement was made by the plaintiff, but the land was not conveyed, the measure of damages was held to be the value of the land.(c)

§ 1013. **Reduction of damages.**—Where the defendant, holding a bond from the owner of a land certificate, had covenanted to "locate" the same so as to cover certain land, and convey the tract thus acquired to the plaintiff, but was compelled to break his covenant through the default of the obligor, it was held, in Texas, in an action by the vendee for breach of this covenant, that the fact that the plaintiff had "located" another certificate on the same land, would go in reduction of the damages.(d)

§ 1014. **Payment in advance.**—It has sometimes been said that where the entire consideration has been advanced, the value of the land at the time it should have been conveyed, is the measure of damages.[1](e) This view, however, can hardly yet be classed as one of the rules governing the subject. It rests probably on the ground that in the cases in question the complete return of the consideration so as to divest the defendant of its benefit and restore it to the plaintiff was not possible.(f)

[1] Boardman *v.* Keeler, 21 Vt. 77.

(a) Bierer *v.* Fretz, 32 Kas. 329.

(b) Chartier *v.* Marshall, 56 N. H. 478.

(c) Combs *v.* Scott, 76 Wis. 662.

(d) King *v.* Gray, 17 Tex. 62.

(e) Cox *v.* Henry, 32 Pa. 18.

(f) See, further, Robertson *v.* Dumaresq, 2 Moore P. C (N. S.) 66; 13 W. R. 280.

The foregoing principle is sometimes regarded as sustained by the case of Wall *v.* London R. P. Co.(a) This was an action for failure to give title to an entrance to the plaintiff's premises as agreed, and the circumstances were peculiar. The reason of the failure seems to have been the failure of a third party to perform his agreement to convey to the defendant. The plaintiff had advanced the consideration. Substantial damages were given. Blackburn, J., said:

"We think the rule in Flureau *v.* Thornhill cannot possibly apply to a case like the present, where it appears on the face of the agreement that the defendants had not yet got any title, and that no abstract of title was to be waited for, but that the plaintiff was forthwith to execute his part of the agreement, and it appears did in fact execute it in a way that can never be undone, and which, as it is found, has conferred on the defendants substantial and permanent benefit. . . . . It is impossible to suppose that the plaintiff intended to part with it (the consideration) merely for a promise that the defendants should hereafter grant him this entrance if they should succeed in getting title thereto, and that, if they could not, he was to have nothing. We think that we may well hold that the true meaning of this particular agreement is, that the promise as between the plaintiff and defendants was absolute, but that the covenant to be inserted in the lease, which would run with the land and regulate the rights of the assignees of the lease, was to be restricted."

This decision is put by Mr. Mayne on the ground that there was an express agreement to make a good title,(b) and Blackburn, J., apparently takes that view also. We have discussed elsewhere(c) the question of the effect of payment in advance in the case of personal property, and need only repeat here that there seems to be no good reason why it should ever change the rule of damages.

(a) L. R. 9 Q. B. 249.
(b) Mayne on Damages, 4th ed. 192.
(c) See ch. on Sales.

§ 1015. **Nichols v. Freeman.**—A peculiar and not very satisfactory rule was laid down in Nichols *v.* Freeman.[1] The plaintiff purchased a lot of land for $8,000, and paid the greater part of the purchase-money. The plaintiff was let into possession, and the defendant executed a bond in the penalty of $10,000, conditioned to convey upon the payment of the balance of the purchase-money. The plaintiff was evicted by the judgment creditors of the defendant, and the property sold by the plaintiff for $2,500, which was admitted to be the real value of the property at the time. Here the court refused to allow the plaintiff to recover the amount of the purchase-money, as if he had repudiated the contract and sued for money had and received. "Here the plaintiff seeks to recover compensation; what sum will put him in as good a condition as if the contract had been performed? In that event he would have got property, which is worth $2,500, but he would have been forced to pay the balance of the purchase-money and interest. He has not paid this latter amount, and his damage is the difference between that sum and the value of the property, which by the case agreed is $207.80"; and to that sum the redress was limited.

§ 1016. **Quality or quantity deficient.**—Where the title to part of the land contracted to be sold proves not to be in the vendor, but the vendee chooses to complete the purchase, the abatement from the purchase-money will be that proportion of the purchase-money which the value of the part unconveyed bears to that of the part conveyed,(a) limited, however, by the actual value of the part unconveyed.(b) Where the land contained a saw-mill,

[1] Nichols *v.* Freeman, 11 Ired. 99.

(a) Hiner *v.* Richter, 51 Ill. 299.
(b) Moses *v.* Wallace, 7 Lea 413.

which the defendant contracted to be of a power of which it fell short, the abatement from the purchase-money is the difference in value of the mill and such a mill as it was contracted to be.(a)

§ 1017. **Expenses.**—The expenses necessarily incurred by the plaintiff are generally allowed under the rule of Flureau *v.* Thornhill,—for instance, the expense of searching the title.(b) Under the rule of the United States Supreme Court it would seem that they should not be allowed unless there was an agreement to pay them, for they would have been equally incurred whether the contract had been performed or broken. The argument that they have proved useless expenses by reason of the breach of contract is of no avail, for under that rule the damages are such as will put the plaintiff in the same position as if the contract had been performed.

The expenses of a previous suit between the parties, in which the vendor was defeated, beyond the costs taxed in that suit, cannot be recovered.(c) New Haven & N. R.R. Co. *v.* Hayden (d) was an action for breach of a contract to secure the plaintiff railroad company a right of way. It was held that the plaintiff could recover as damages expenditures for taking land for the road-bed and whatever else was necessary for the proper construction of the road-bed, but not for land taken for stations; and costs and expenses of settling the damages for taking the land, which included not only the ordinary legal costs and witnesses' fees, but attorney's and counsel fees

(a) Walker *v.* France, 112 Pa. 203.

(b) Walker *v.* Moore, 10 B. & C. 416; Pounsett *v.* Fuller, 17 C. B. 660; Engel *v.* Fitch, L. R. 3 Q. B. 314; L. R. 4 Q. B. 659; Cockcroft *v.* N. Y. & H. R.R. Co., 69 N. Y. 201; Bigler *v.* Morgan, 77 N. Y. 312; Northridge *v.* Moore, 118 N. Y. 419; Walton *v.* Meeks, 120 N. Y. 79.

(c) Hodges *v.* Litchfield, 1 Bing. N. C. 492.

(d) 117 Mass. 433.

in procuring the settlement. The court distinguished Leffingwell *v.* Elliott and Reggio *v.* Braggiotti,[a] on the ground that in those cases the employment of counsel was not "a direct and necessary consequence of the breach of contract by the defendants," while these proceedings were necessary. The court further held that the plaintiffs could not recover expenses of employing counsel before a committee of the legislature to obtain proper legislation.[b]

Where the plaintiff was let into possession under the contract, he may recover the reasonable value of the improvements, less the value of the use of the land,[c] probably in all cases; but certainly when the defendant knew he had no title.[d]

§ 1018. **Measure of value.**—The general principle where compensation is given for the loss of the land will be found to be that laid down by Mr. Justice Blackburn in Wall *v.* City of London R. P. Co.[e] "What the pecuniary amount is of the difference between the present state of things, and what it would have been if the contract had been performed and the plaintiff had got title." The general rule in this class of cases is the difference between the contract price and the market value of the land at the time when the contract should have been performed.[f] So in Massachusetts, where a land agent of the Commonwealth who, as such, had sold its bond for the conveyance of land, wrongfully caused the title to be transferred to other

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[a] See § 238.

[b] *Acc.* Western R.R. Co. *v.* Babcock, 6 Met. 346.

[c] Bellamy *v.* Ragsdale, 14 B. Mon. 364; Sheard *v.* Welburn, 67 Mich. 387.

[d] Erickson *v.* Bennet, 39 Minn. 326.

[e] L. R. 9 Q. B. 249.

[f] *Acc.* Gale *v.* Dean, 20 Ill. 320; Bierer *v.* Fretz, 32 Kas. 329; Doherty *v.* Dolan, 65 Me. 87; Stevenson *v.* Fuller, 75 Me. 324; Loomis *v.* Wadhams, 8 Gray 557.

parties than the vendee, the assignee of the vendee (claiming through various mesne assignments) was held entitled to recover the value of the land at the time of the wrongful transfer.(a) In Robertson *v.* Dumaresq,(b) an army officer employed in the civil service of the government of Australia received from the governor of that colony a promise of a grant of land on condition that he settled in the colony. His claim having been defined, but the grant not made, he took proceedings under a local act against the governor of the colony to obtain compensation. It was held that he was entitled to compensation measured by the value of the specific land *at the time of bringing suit.*

* In Maine, in an action by the vendee on an agreement to convey land, it has been held that the jury are not confined to the value of the land for agricultural or pastoral, or other useful purposes, nor to be controlled by the probability that the land would be in demand for building lots; but that they might take into consideration *the marketable value* also at the time; and that their result should be arrived at by taking into view all the objects for which the land is desirable.[1] **

In Engel *v.* Fitch,(c) it was held in the Queen's Bench, that the measure should be the difference between what the vendee agreed to pay and the price he would have got on his sub-contract; but in the Exchequer Chamber, that it should be the difference between what he agreed to pay and the value which would be fixed by the market price. The case was affirmed, however, as there was no other evidence of value than the resale, and that, therefore, was conclusive, particularly in the condition of the record.

[1] Warren *v.* Wheeler, 21 Me. 484.

(a) Pingree *v.* Coffin, 12 Gray 288.
(b) 2 Moore P. C. (N. S.) 66; 13 W. R. 280.
(c) 10 B. & S. 738, L. R. 3 Q. B. 314, L. R. 4 Q. B. 659.

In Clagett *v.* Easterday,(a) A. covenanted to convey to B. a grant of land on which there was a mill site. In an action for breach of the covenant, it was held that the measure of damages was the fair rental value of the property, and that evidence as to the value of the property as a mill site was admissible, but not evidence as to the probable rents and profits of a mill such as might be erected there. In Hoback *v.* Kilgores (b) it was held that in estimating damages for failure to convey the quantity agreed, the jury could take into account the value of improvements as increasing the value of part of the land, and was not obliged to base its estimate on the theory that it was all equally valuable. It must be added, that the remark of Lord Wensleydale, in Robinson *v.* Harman,(c) that the party whose contract is broken "is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed," must be taken as controlled by the principles established in Hadley *v.* Baxendale.(d) If, by a peculiar and special use which the vendor did not and could not reasonably have been expected to anticipate, the injured vendee might have made a fortune out of the property which should have been conveyed, the vendor will not be expected to supply the lost fortune. He can only be required to make good the loss which he had reason to expect would result from his breaking his agreement, or which, "according to the usual course of things," would have so resulted.(e)

(a) 42 Md. 617.

(b) 26 Gratt. 442.

(c) 1 Ex. 850, 855.

(d) 9 Exch. 341.

(e) See the observations of Kelly, C. B., in Engel *v.* Fitch (on appeal), 10 B. & S. 738, 743; L. R. 4 Q. B. 659; *cf.* S. C. L. R. 3 Q. B. 314; and the discussion of Hadley *v.* Baxendale, *ante*, ch. iv.

The time at which the value of the land is to be taken is, as we have just seen, the time of the breach,(a) and therefore where the plaintiff had been let into possession and had made improvements, the value of the improvements was included.(b)

§ 1019. **Covenant to make partition.**—* The effect of a covenant to make partition and execute releases was much considered in an early case in New York,[1] which was an action of assumpsit for money paid to induce a party to enter into an agreement.

The plaintiff and defendant were joint proprietors in the proportion of one-third and two-thirds of certain lands, of which the plaintiff had conveyed a part by deed, with covenants for quiet enjoyment and of warranty. They then agreed, under seal, to partition the tract, so that the part conveyed by the plaintiff should be set off as his portion, appointed three persons to divide the lands, and covenanted to execute mutual releases. Partition being made, the defendant refused to execute the release agreed on. The plaintiff had paid the defendant four hundred dollars to induce him to enter into the agreement. The judge charged at the trial that the plaintiff was entitled to recover as damages all that he had been obliged to pay or was liable to pay to the purchasers of the land from him, and the expenses of the partition—in other words, two-thirds of the amount of the consideration money, with interest, and one-third of the expenses of partition, together with four hundred dollars and interest. A verdict was

[1] Shepard *v.* Ryers, 15 Johns. 497.

(a) Whiteside *v.* Jennings, 19 Ala. 784; Marshall *v.* Haney, 4 Md. 498; Haney *v.* Marshall, 9 Md. 194; Allen *v.* Atkinson, 21 Mich. 351.

(b) Cade *v.* Brown, 25 Pac. Rep. 457 (Wash.).

taken for this sum; but the court set it aside, holding, that so long as the original covenant subsisted, the money paid by the plaintiff (*i. e.*, the four hundred dollars) could not be recovered back; that no eviction being shown, the plaintiff could only recover, at most, nominal damages; and it was suggested that the partition without any conveyance might have the effect of estopping the defendant to set up any title to his two-thirds. The court said: "The plaintiff might possibly apply to the Court of Chancery, and compel a specific performance of the defendant's agreement to release his claim to these farms; but as long as he chooses to rest upon his covenant for damages at law, he must show himself damnified, or he can only recover nominal damages."(a) **

§ 1020. **Barter contracts.**—By barter contracts are meant contracts where the land is not to be paid for in money, but by other land given or by services given in exchange. There seems to be no reason why the rule should be different from what it is where the payment is

(a) Morrison *v.* Darling, 47 Vt. 67, was an action on a contract having some analogies with an agreement to make partition. The defendant agreed not to interfere with the plaintiff in the purchase of the interests of five heirs of an estate. The plaintiff purchased four shares, but was prevented from purchasing the fifth by the defendant's purchasing it. The plaintiff was allowed to recover what that fifth was worth above what the plaintiff would have had to pay for the same had the defendant not interfered. He was not allowed to recover the costs and expenses of a partition suit carried on by him to determine his share, although the jury found that it was reasonably carried on, and that he was compelled by the defendant's conduct to carry it on, the court saying that it could not be said that the plaintiff was *compelled* to do so. The reason seems to be that the plaintiff might have had to carry on such a suit against some other purchaser if the defendant had not purchased. The fact that the fifth share was part of the estate in common enhanced its value for the plaintiff. It was held that that fact might properly be considered, apparently on the ground that the defendant knew of the plaintiff's purpose in making the contract.

to be made in money. The general rule, however, is that the difference in value between the things to be exchanged is the measure of damages. In an action of covenant on a contract, by which the defendant agreed to build a house for the plaintiff, and the plaintiff to convey to the defendant a house and lot in payment, the breach being the neglect to build the house, the measure of damages is the difference between the value of the house to be built and that of the house and lot to be conveyed.(a) Where the property to be exchanged is real estate, if the plaintiff have conveyed that which he agreed to convey, his damages are the value of that he should have received.(b) In New York, where services were performed upon a parol contract to pay for them by a conveyance of certain land, the contract being within the statute of frauds, it was held that in an action to recover the value of the services, the value of the land might be shown as evidence of such value.(c) In Pennsylvania, however, according to the rule of damages adopted in that State, the measure of damages, upon breach of a contract to convey land in exchange for services, is the consideration, that is, the value of the services.(d) In Brigham *v.* Evans (e) there was an agreement to exchange land of the defendants for land and horses of the plaintiff, that an appraisal should be made and that either party should pay the balance decreed against him by that ap-

(a) Laraway *v.* Perkins, 10 N. Y. 371.

(b) Devin *v.* Himer, 29 Iowa 297.

(c) Burlingame *v.* Burlingame, 7 Cow. 92; King *v.* Brown, 2 Hill 485.

(d) McNair *v.* Compton, 35 Pa. 23; Hertzog *v.* Hertzog, 34 Pa. 418; Graham *v.* Graham, 34 Pa. 475. A rule resembling that now generally followed was laid down by the earlier Pennsylvania decisions. Rohr *v.* Kindt, 3 Watts & Serg. 563; Jack *v.* M'Kee, 9 Barr 235; Bash *v.* Bash, 9 Barr 260; M'Dowell *v.* Oyer, 21 Pa. 417; Malaun *v.* Ammon, 1 Grant 123.

(e) 113 Mass. 538. See Plummer *v.* Rigdon, 78 Ill. 222; Wall *v.* London R. P. Co., L. R. 9 Q. B. 249.

praisal. An appraisal was made by which the plaintiff's horses were valued at much more than they were worth, and at a subsequent sale they brought much less. The defendant refused to convey. It was held that the proper measure of damages was the difference between the market value of the property and the amount the plaintiff would have received for it if the defendant had carried out his bargain; and that the subsequent sale was evidence of value which could go to the jury to show that the plaintiff's property was appraised at more than its full value, which was a benefit the plaintiff would have derived from the contract and had lost by the breach. In Noyes *v.* Phillips ([a]) it was held that the measure of damages for breach of contract to give deeds of parcels of lands or to forfeit $500, was the difference in value between the parcels to be received and given. The plaintiff here did not except to the decision that the $500 was a penalty, and not liquidated damages, and therefore there was no objection to damages being given as if there had been no reference to the $500.([b]) In Gobble *v.* Linder,([c]) a provision in a contract for the exchange of farms, that the party failing should pay $1,500, was held to be a provision for liquidated damages, and the plaintiff was allowed to recover that amount.

§ 1021. **Damages in actions to enforce specific performance.**—In suits in equity for specific performance the purchaser is usually given the value of the mesne profits of the land during the delay in performance. These are sometimes looked upon in the light of damages for delay. At other times it is said that the vendor is held as the trustee of the vendee, who in equity is the owner. In

([a]) 60 N. Y. 408.
([b]) *Acc.* Bierer *v.* Fretz, 32 Kas. 329.
([c]) 76 Ill. 157.

the latter view it would seem that the vendee should only recover what benefit the vendor has actually received. We must refer on this question to treatises on equity jurisprudence.(a) There is, however, a case in the New York Court of Appeals where this principle was departed from, and we think it important to notice it here, as it is undoubtedly an exception to the general rule. The case is Worrall *v.* Munn.(b) The property in question was chiefly valuable for certain deposits of clay adapted to the manufacture of brick. A reference had been had to ascertain *the damages* to the vendee by having been kept out of possession. The defendant Prall was the one who had contracted to deliver the land, and the purchase-money, it had been decreed, should be paid to him, while the defendant Munn had been in possession. The court held that, as the use of the land was of little value except for the clay, and that was still there, the only compensation the plaintiff could recover was interest on the purchase-money paid by him, together with interest on each annual payment to the time of the assessment of damages. The principle on which the judgment was rendered was that the plaintiff could sue for the rents and profits actually received, in which case he would have to pay interest on the purchase-money. But if he was not given the rents and profits, and had not paid the purchase-money, he would be indemnified by being relieved from payment of interest on the purchase. That, therefore, here the defendant, having had the use of that purchase-money, should pay to him the interest on it. A question was also raised as to the damages which should be given for waste, and it was held that it should be the value of what was taken, and not the injury to the in-

(a) Story, Eq. Jur. § 784 *et seq.*
(b) 38 N. Y. 137.

heritance. Interest was given on the value from the time the plaintiff was let into possession to the time of assessment. This rule was adopted on the ground that in equity the vendee is considered owner from the time of the contract, and, therefore, entitled to what is taken. The case again came before the Court of Appeals,[a] when the decision was affirmed on both points. Grover, J., dissented, apparently on both points. Church, C. J., and Peckham, J., did not vote. The question was considered in a late case in Virginia.[b] That was a suit for specific performance, and for recovery of the rents and profits of which the vendee had been deprived by occupation of the vendor. It was held that he could recover the annual value of the lands "in the hands of a prudent and discreet tenant upon a judicious system of husbandry, ... the mode of treatment by the occupant having some influence in determining this value"; that he was not restricted to actual profits made, that the rent might be estimated, and that interest (under the Virginia statutes) should be allowed as the rent.

§ 1022. **Refusal to give possession of leased premises.**— The general principle in this case is the same as in other cases of refusal to convey,[c] although the courts are more nearly agreed in adopting the principle of complete compensation for the loss of the bargain. The ordinary rule is to allow the difference between the rental value of the premises for the term and the rent reserved.[d] In

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[a] 53 N. Y. 185.

[b] Bolling *v.* Lersner, 26 Gratt. 36, 61.

[c] McClowry *v.* Croghan, 1 Grant 307.

[d] Rose *v.* Wynn, 42 Ark. 257; Cohn *v.* Norton, 57 Conn. 480; Green *v.* Williams, 45 Ill. 206; Dobbins *v.* Duquid, 65 Ill. 464; Smith *v.* Wunderlich, 70 Ill. 426; Alexander *v.* Bishop, 59 Ia. 572, 578; Hall *v.* Horton, 79 Ia. 352; Hughes *v.* Hood, 50 Mo. 350; Trull *v.* Granger, 8 N. Y. 115; Giles *v.* O'Toole, 4 Barb. 261; Dean *v.* Roesler, 1 Hilt. 420; Poposkey *v.* Munk-

Williams *v.* Oliphant,[a] which was an action of assumpsit by lessee for lessor's refusal to give possession, the defendant on the trial asked the court to instruct the jury that the rule of damages in the case was the difference between the rent which plaintiff was to pay, and the market value of the rent of the premises at the time they were to be delivered to him ; and that, if the rent to be paid was the highest in the neighborhood, and no greater rent could be had for the premises by plaintiff, he was only entitled to nominal damages. The court refused to give the instruction ; but gave the following : "Remote or special damages, such as expenses for removing to a more remote farm, are not to be allowed ; but for all such as legitimately and directly arise from the breach, you are to give the plaintiff the equivalent of performance in money. If the defendant is delinquent, or in fault by breaking his contract, he is bound to repair the loss of the plaintiff thereby." It was held that the refusal was correct and that the instruction given was, so far as it went, substantially correct. On the breach by the lessor of two contracts for the lease for the season of navigation, of the bar-rooms of four steamers, two of which were laid up for a part of the season, and the others not finished till it was far advanced, the measure of the lessee's damages was held to be the amount of rent paid for the saloons while he was deprived of their use, with interest from the close of navigation (*i. e.*, from the time when the owners seized the boats) until the close of the season.[b] Where a lessor only delivered up part of the premises which he had leased to the plaintiff, and the plaintiff had paid rent for the

witz, 68 Wis. 322. But only nominal in Pennsylvania: McCafferty *v.* Griswold, 99 Pa. 270.

[a] 3 Ind. 271.

[b] McCleary *v.* Edwards, 27 Barb. 239.

whole term, it was held that the plaintiff could recover the diminished value of his lease in its not giving him all the premises, and it was further held that he could not include expenses put on the building, nor damages for injury to his business on account of the fact that the lease was only of use to him if he had the whole building, though it was said that he could have recovered for such injury to his business if he had given notice of his object in hiring the premises.([a]) In Hexter *v.* Knox,([b]) a plaintiff was allowed to recover the rental value of rooms *for hotel purposes* where the defendant delayed giving him possession of a building adjoining his hotel. The defendant had notice of the plaintiff's object in hiring the premises. It was said that the plaintiff could recover the rental value of those rooms "furnished," for which he had furniture.([c]) In Newbrough *v.* Walker ([d]) it was also held that conjectural profits which might have been realized by the lessee from the use of the demised premises, could not be allowed.

Breach by Vendee.

§ 1023. Difference between value and contract price recoverable.—The usual rule is to give the vendor compensation for his actual loss, that is, for the difference between the price he was to receive and the value of the land left on his hands. This was laid down in Laird *v.* Pim,[1]

[1] 7 M. & W. 474, 478, *per* Parke, B. But see Hawkins *v.* Kemp, 3 East 410, and 2 Chitty Pl. 291.

([a]) Townsend *v.* Nickerson Wharf Co., 117 Mass. 501.

([b]) 39 N. Y. Super. Ct. 109; 63 N. Y. 561.

([c]) *Cf.* Korf *v.* Lull, 70 Ill. 420; Ruff *v.* Rinaldo, 55 N. Y. 664.

([d]) 8 Gratt. 16. See also Cilley *v.* Hawkins, 48 Ill. 308. In Adair *v.* Bogle, 20 Iowa 238, it was decided that the plaintiff might also recover damages for loss of employment and expense incurred in preparations for removal to the premises.

where Rolfe, B., held that the plaintiff was entitled to such damages only as had resulted from the defendants' breach of the contract; and, on argument of a rule to show cause why the damage should not be increased to the amount of the purchase-money, it was said: "The question is, how much worse is the plaintiff by the diminution in the value of the land or the loss of the purchase-money, in consequence of the non-performance of the contract. It is clear he cannot have the land and its value too." This rule has been adopted in Vermont,[1] New Hampshire,([a]) Massachusetts,([b]) and other jurisdictions.([c])

Where the defendant buys land at auction, and on his refusal to complete the purchase the land is resold, the price obtained at the second sale may be shown as strong evidence of the plaintiff's loss;([d]) but not where the second sale was held under conditions which necessarily made the price less.([e]) But if one of the conditions of the sale was that in case of default of purchaser the land should be resold on his account, the difference in price at the two sales is absolutely fixed as the measure of damages.([f])

In Pennsylvania([g]) where three persons verbally agreed to buy land together, and two of them paid all the pur-

[1] Sawyer *v.* M'Intyre, 18 Vt. 27.

([a]) Griswold *v.* Sabin, 51 N. H. 167.

([b]) Old Colony R.R. Co. *v.* Evans, 6 Gray 25.

([c]) Porter *v.* Travis, 40 Ind. 556; Robinson *v.* Heard, 15 Me. 296; Wasson *v.* Palmer, 17 Neb. 330; Ellet *v.* Paxson, 2 W. & S. 418.

([d]) Adams *v.* McMillan, 7 Port. 73; Gardner *v.* Armstrong, 31 Mo. 535; Ashcom *v.* Smith, 2 P. & W. 211; Bowser *v.* Cessna, 62 Pa. 148.

([e]) Weast *v.* Derrick, 100 Pa. 509.

([f]) Webster *v.* Hoban, 7 Cranch 399; Hutton *v.* Williams, 35 Ala. 503; Miller *v.* Collyer, 36 Barb. 250.

([g]) Meason *v.* Kaine, 63 Pa. 335; 67 Pa. 126; but see Tripp *v.* Bishop, 56 Pa. 424.

chase-money, it was held that these two could recover against the third, and the measure of damages would be the difference between that part of the contract price which he had agreed to pay and the market value of his share of the whole property. In Evrit *v.* Bancroft,(a) the plaintiff entered into an agreement with the defendant, which declared that he (plaintiff) sold to the defendant a certain farm placed in his hands to sell. The plaintiff was to receive from the owner all that was paid for the land over $37 per acre. This was an action for the defendant's failure to complete his contract. Held, that the plaintiff, being in no better position than his principal, could recover only nominal damages where the value at the time of the breach exceeded the contract price; and that the plaintiff could not recover the commission he would have received from his principal, the court saying: "The loss of such compensation was not the natural and proximate result of the breach by the defendants of their contract." Where one sold land for $5,000, the parties agreeing that the seller should have all the advance the property could be sold for over that sum within five years with interest, and on a certain day the seller notified the purchaser to sell the property, as it would bring a large advance, and the purchaser refused, having already sold the property to another, it was held that the price it would have brought on that day was the measure, not the highest value for five years.(b)

§ 1024. **Contract price recoverable in some States.**— It has sometimes been held, where there has been a tender of a deed which is refused but not withdrawn, that the price agreed to be paid should be recovered in its entirety. This probably had its origin in the analogy

(a) 22 Oh. St. 172, 180.

(b) Means *v.* Milliken, 33 Pa. 517.

of chattel sales, where the title has frequently passed at the time of the vendee's refusal to pay, and the vendor is properly given the amount of the purchase-money as damages. In an early New York case, in an action on an agreement of this nature, the plaintiff, the vendor, was allowed to recover the agreed price of the land, with interest. But although the case went up on other points, the question was not argued.[1] In a subsequent case, it was said :

"Suppose in the case of a covenant to convey a farm for a specified sum, and a deed tendered but refused, and the vendor sells to another, shall he yet recover the whole price of the original vendee? I admit that, *in some cases*, where property is so tendered, and the tender is not withdrawn, the price may be recovered ; but this is on the ground that the thing sold has an independent existence, and the *corpus* not being perishable, and having legally passed by the tender and subsequent recovery, may still be actually delivered over whenever the vendee shall demand it."[2]

This rule was reluctantly held to be the settled one, on a review of the cases, in Richards *v.* Edick.(a)

In Maine, where suit was brought for the price of a pew, a deed having been tendered and refused, it was said, though the point does not appear to have been discussed by counsel, that "the measure of damages was, as the judge instructed the jury, the price agreed to be paid for the pew by the defendant, who will be entitled to the deed whenever he chooses to accept it."[3] In Iowa, where

[1] Franchot *v.* Leach, 5 Cow. 506.

[2] Shannon *v.* Comstock, 21 Wend. 457. But in this very case, it was held, where a plaintiff had agreed to take certain freight for a stipulated sum, and averred a readiness and offer to perform on his part, that he could not recover the contract price, but only as much as he had actually lost by the defendant's neglect, the court saying: "A tender and offer to perform is equivalent to performance for the purpose *of sustaining an action*. It is *quasi* performance, but it *does not regulate the amount of damages*." See also Heckscher *v.* McCrea, 24 Wend. 304 ; and Costigan *v.* Mohawk & Hudson R.R., 2 Denio 609.

[3] Alna *v.* Plummer, 4 Me. 258.

(a) 17 Barb. 260. *Contra*, Pugsley *v.* Gillespie, 1 Pugs. 195.

the guarantors in a contract, one of whom was the vendor of certain real estate, guaranteed the vendee that it would be worth $2,800 on a specified day, and that they would pay that sum for it on that day if he should then elect to sell it, and on the day stipulated he elected to sell and tendered them a deed of the property; it was held, in an action on the guaranty, that the measure of damages was the price named, without regard to the value of the land.(a)

*The question is evidently not free from perplexity: on the one hand, it is said that the vendor by making a tender has performed his contract so far as it lies in his power, that his right is complete to the performance of the contract by the vendee, and that this performance is the payment of the purchase-money. But, on the other side, it is replied with great force, that the recovery cannot pass the fee of the land; that the legal seizin still remains as at first; that the vendor has not parted with his property; that if the land has not fallen in price, he has lost nothing; that the common law gives damages for none but actual loss; and it is insisted that the true measure of damages in such case, is the difference between the stipulated price and the actual value at the time of breach.**

§ 1025. **Interest and expenses.**—*As to the interest, it has been held that where the vendee in a contract for the purchase of real estate, takes possession of the property as owner, without having paid the purchase-money, he is bound to pay interest. The act of taking possession is an implied agreement to pay interest.[1] **

Where the vendor, with the knowledge of the vendee, incurs expenses in order to complete the sale, he may re-

[1] Fludyer *v.* Cocker, 12 Vesey 25; Stevenson *v.* Maxwell, 2 N. Y. 408.

(a) Goodpaster *v.* Porter, 11 Iowa 161.

cover the amount of these expenses upon default of the vendee.(a) And so any losses which might have been anticipated may be recovered.(b)

§ 1026. **Deposits at auction.**—* In contracts of purchase of this description, a clause is often inserted for a deposit, and a forfeiture of that deposit if the purchaser do not fully carry out his agreement. In a case of this kind, where it was declared that the deposit was to be forfeited as liquidated damages, it was still held that the plaintiff could go for damages at large, and was not confined to the deposit.[1] ** It was held in Ockenden *v.* Henly (c) that if a deposit is given on purchasing at auction, and the vendor subsequently resells and brings an action for the deficiency, that deposit is treated as part of the purchase-money, and the vendor's recovery is diminished by that amount. The question was again considered in England, in Essex *v.* Daniell.(d) In that case one condition of the auction sale was, that if the vendee failed to complete the sale, the deposit money should be forfeited and the vendor should be at liberty to resell, the vendee to be liable for any deficiency between the first sale and the subsequent one, and for the expenses of the first sale. The vendor, without reselling, brought this action. It was held that he could recover the auctioneer's expenses on the first sale, and at the same time retain the deposit. The court distinguished this case from Ockenden *v.* Henly on the ground that there was a resale and the

[1] Icely *v.* Grew, 6 Nev. & Man. 467.

(a) Kelley *v.* West, 36 Minn. 520.

(b) Hurd *v.* Dunsmore, 63 N. H. 171.

(c) E. B. & E. 485. In Curtis *v.* Aspinwall, 114 Mass. 187, by the terms of the sale, $125 was to be paid on the spot. This was to be forfeited to the seller in case of breach. It was held that this money should be considered by the jury in reduction of damages.

(d) L. R. 10 C. P. 538.

plaintiff claimed for the deficiency, and therefore the rule that the deposit should be considered as part of the purchase-money applied. In this case at bar, however, these expenses had nothing to do with the purchase-money. The deposit money, upon an agreement that it shall be forfeited on default is always regarded as liquidated damages, and it is to be retained on default.(a)

Fraud in Sale of Land.

§ 1027. Measure of damages for fraud.—This seems to be the proper place for considering the measure of damages in actions for fraud committed in the course of a sale of land. In such actions, as in actions for fraud in the sale of chattels, it has usually been held that the measure of damages is the difference in value between the land as it would have been if as represented and as it actually was.(b) Such difference in value must be estimated at the time of the sale.(c) So in Indiana, where the vendor of an undivided half interest in real estate falsely and fraudulently represented to the purchaser that there was a house on the land of a particular description, the measure of the vendee's damages was held to be one-half of the increase there would have been in the value of the land if there had been such a house on it at the time of the sale, and not merely half the amount it would have taken to put it

(a) Lea *v.* Whitaker, L. R. 8 C. P. 70.

(b) Herfort *v.* Cramer, 7 Col. 483; Williams *v.* McFadden, 23 Fla. 143; Drew *v.* Beall, 62 Ill. 164; Likes *v.* Baer, 8 Ia. 368; Gates *v.* Reynolds, 13 Ia. 1; Wright *v.* Roach, 57 Me. 600; Page *v.* Wells, 37 Mich. 415; Jackson *v.* Armstrong, 50 Mich. 65; Stockham *v.* Cheney, 62 Mich. 10; Markel *v.* Moudy, 11 Neb. 213; Krumm *v.* Beach, 96 N. Y. 398; Walker *v.* France, 112 Pa. 203. In Arkansas it is held that the plaintiff may elect between this amount and the difference between the price paid and the real value. Matlock *v.* Reppy, 47 Ark. 148.

(c) Gaulden *v.* Shehee, 24 Ga. 438.

there.(a) So where the defendant misrepresented the boundaries of the land conveyed, the measure of damages is the difference in value between the tract shown and the tract conveyed.(b) So in an action against a municipal corporation for misrepresentation as to the extent of its rights in property leased by it; (c) and in an action for misrepresentation of the amount of business done on the premises leased to the plaintiff.(d) So it has been held in Massachusetts, on the sale of a tannery, that where one is deceived in the purchase, by the false affirmations of a third party, and thus pays more than it is worth, the party by whom he was thus deceived cannot defeat the action by showing that the plaintiff sold the property for the same sum which he paid for it; and it was said that the sum for which the party sold the property is not the rule by which to measure the damages, otherwise it might make the question of fraud depend upon the rise or fall of the property in the market.[1]

This rule applies, however, only to fraud committed in the course of a sale or lease of land; and so where the defendant borrowed money from the plaintiff upon the false representation that the former had title to certain land given as security, the measure of damages is not the value of the land, but the amount of the loan.(e)

Where the defendant fraudulently misrepresented his title to the land, the vendee who had been ejected was allowed to recover the value of the improvements he had

[1] Medbury *v.* Watson, 6 Met. 246; approved in Cornell *v.* Jackson, 3 Cush. 506.

(a) Sangster *v.* Prather, 34 Ind. 504.

(b) Foster *v.* Kennedy, 38 Ala. 359; Smith *v.* Kirkpatrick, 79 Ga. 410; Hahn *v.* Cummings, 3 Ia. 583; Woolman *v.* Wirtsbaugh, 22 Neb. 490.

(c) Sharp *v.* New York, 40 Barb. 256.

(d) Rawson *v.* Pratt, 91 Ind. 9.

(e) Horne *v.* Walton, 117 Ill. 130.

placed upon the land in the regular course of occupation ;([a]) and so where a purchaser erects a residence on the lot purchased on the supposition that there is a street in front of it, as fraudulently represented to him by the vendor, plaintiff recovers the difference between the value of the lot with and without the street and also of the house as a residence with and without street.([b]) It has been held in Illinois that in an action for inducing one to take a lease of premises by fraudulent representations as to the defendant's title, the damages are the reasonable expenses of moving to a suitable place near by, and the difference in rental of a lot similarly situated.([c])

§ 1028. **Deficiency in quantity.**—Where the land is not *in quantity* what it was represented to be, the measure of damages is determined by the average value of the tract. Thus where A. sold B. several parcels of land for an aggregate sum, and represented that one of them contained two hundred acres, which representation was fraudulent, the rule of damages was found by multiplying the average value per acre of the parcel in question by the number of acres in the deficiency.([d]) In a case in South Carolina, the defendant had sold and conveyed to the plaintiff for a sum certain one hundred and twenty acres of land, to fifty-four acres only of which he had a title. Of the other acres, fifty-six belonged to the State, from which the plaintiff, subsequent to the defendant's conveyance, obtained a grant of them. The remaining ten were covered by an old grant. In an action of deceit by the vendee it was held by the Supreme Court of the State, that the measure of damages was the *pro rata*

([a]) Carvill *v.* Jacks, 43 Ark. 454.
([b]) White *v.* Smith, 54 Ia. 233.
([c]) Wilson *v.* Raybould, 56 Ill. 417.
([d]) Thompson *v.* Bell, 37 Ala. 438.

proportion of the consideration belonging to the ten acres covered by the adverse title, and the expense of obtaining the grant of the fifty-six acres.(a) If the land was sold for a certain price per acre, it has been held that the value of the deficient land is to be estimated at the contract price.(b) If the title, represented good, entirely failed, the measure of damages is the value of the land.(c) The measure of damages in an action for fraudulently representing real estate as unincumbered, which was in fact subject to a mortgage, is the amount of the mortgage and interest, if that is less than the value of the land; (d) and where the mortgage is foreclosed, the costs of the foreclosure.(e) Where the vendor of a mill-site misrepresented its description, but the vendee elected to keep the premises actually conveyed, the measure of damages was held to be what it would cost to obtain by expeditious legal proceedings the land falsely represented to be also covered by the deed.(f)

Where the defendant misrepresented the boundaries of the land sold, but upon being sued tendered a deed of the strip which had not been included in the original conveyance, it was said by the Supreme Court of New Hampshire that if this were a tender that the defendant as a reasonable man should accept; for instance, if the strip were a narrow one, which would be valueless except as part of the defendant's land, this tender should be considered in mitigation.(g) This doctrine seems question-

(a) Parker *v.* Walker, 12 Rich. L. 138.

(b) Hallam *v.* Todhunter, 24 Ia. 166; Anderson *v.* Snyder, 21 W. Va. 632.

(c) Stewart *v.* Jack, 78 Ia. 154; Donlon *v.* Evans, 40 Minn. 501. But in Texas the measure of damages is the purchase-money, with interest, Haddock *v.* Taylor, 74 Tex. 216.

(d) Cross *v.* Devine, 46 Hun 421.

(e) Haight *v.* Hayt, 19 N. Y. 464.

(f) Reynolds *v.* Cox, 11 Ind. 262.

(g) Towle *v.* Lawrence, 59 N. H. 501.

able. It is opposed to the general principle excluding from consideration offers of reparation not accepted by the plaintiff.([a]) The only case cited in support of the doctrine was a mere dictum of the Supreme Court of the United States,([b]) approving the rule that in actions for the conversion of a chattel, the chattel might be brought into court and surrendered.([c]) This is not to be extended to the case of land without more authority.

§ 1029. **The rule in Smith v. Bolles.**—The rule laid down in the case of Smith *v.* Bolles,([d]) and already discussed, would in terms apply only in the case of fraud in the sale of a chattel. But it has been held in the Federal courts that the reason of the rule applies also in the case of the sale of land, and, therefore, that the measure of damages in the case of fraud in the sale of land is not the difference between the value of the land as it was and as it was represented, but the difference between the value of the land and the price paid.([e]) Whether this rule will be generally followed cannot yet be determined.

([a]) § 53.
([b]) Colby *v.* Reed, 99 U. S. 560.
([c]) See § 54.
([d]) 132 U. S. 125. See § 778.
([e]) Atwater *v.* Whiteman, 41 Fed. Rep. 427; Glaspell *v.* Northern Pac. R.R. Co. 43 Fed. Rep. 900.

CHAPTER XXXIV.

SET-OFF AND RECOUPMENT OF DAMAGES.

§ 1030. Reduction of recovery by amount of adverse claim.
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1032. Equitable set-off.
1033. Difference between recoupment and set-off.
1034. Original meaning of recoupment.
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1071. Exchange of property.
1072. Recoupment prevents recovery for same cause.
1073. Failure to recoup does not bar action for same cause.
1074. Payment not pleaded.
1075. Recoupment after verdict.

§ 1030. Reduction of recovery by amount of adverse claim.—Having now examined the rules which govern the measure of compensation allowed in the various

classes of actions by which relief is obtained, * we have to consider the principles upon which an acknowledged right for redress or remuneration is reduced in its amount by the establishment of an adverse or cross-claim, which is taken into consideration in the same suit, to use technical language, by way of set-off, or recoupment or counter-claim. **

§ 1031. Set-off.—The doctrine of set-off is so fully treated in the various treatises devoted to that particular subject, that it is unnecessary to do more than briefly state some of the general principles here. *At common law no right of set-off existed, it being the object of the system to confine every suit to the particular subject of litigation which gave rise to it. The courts of equity, however, in this as in many other cases, lent a ready ear to the appeals made to them from the narrow remedies and harsh doctrines of the common law; and to prevent circuity of action and multiplicity of litigation, introduced the principle of set-off, a principle well known to the civil law by the name of compensation.

This doctrine, which is nothing more than a system of settling cross-demands in one suit, finally appeared so equitable that legislation was resorted to to get rid of the necessity of applying to a court of equity; and the principle of set-off is now fully established in both American and English legislation. It is unnecessary here to enter upon an examination of the various statutes of set-off; it is sufficient to say that, as a general rule, where adverse or cross-claims of a pecuniary character exist between the same parties, and the demands are liquidated, the principle is applied.

But the object of the statutes of set-off is to settle mutual accounts and debts. Wrongs or torts done, and unliquidated damages claimed, have never been per-

mitted to be set off.[1](a) And unliquidated damages have been defined as follows: "Unliquidated damages are such as rest in opinion only, and must be ascertained by a jury, their verdict being regulated by the peculiar circumstances of each particular case; which cannot be ascertained by computation or calculation, as, for instance, damages for not using a farm in a workmanlike manner, for not building a house in a good and sufficient manner, on warranty in the sale of a horse, for not skilfully amputating a limb, and other cases of like character."[2] In Illinois, however, unliquidated damages arising out of contract, express or implied, may be set off in actions *ex contractu*, unless they are totally disconnected with the plaintiff's cause of action.[3]** In England, unliquidated damages cannot be set off either at law or in equity.(b) Under the Pennsylvania defalcation act, damages arising out of a separate transaction, although unliquidated, can

[1] Butts *v.* Collins, 13 Wend. 139, 156; McDonald *v.* Neilson, 2 Cowen 139; Heck *v.* Shener, 4 Serg. & R. 249; 10 S. & R. 14; U. S. *v.* Robeson 9 Pet. 319, 325; U. S. *v.* Buchanan, 8 How. 83; Howlet v. Strickland, Cowp. 56; Freeman *v.* Hyett, 1 W. Black. 394.

[2] Butts *v.* Collins, 13 Wend. 139, 156.

[3] Sargeant *v.* Kellogg, 10 Ill. 273; Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15.

(a) Allen *v.* U. S., 17 Wall. 207; Hunt *v.* Middlesworth, 44 Mich. 448; Johnson *v.* Jones, 16 Mo. 494; Mahan *v.* Ross, 18 Mo. 121; Pratt *v.* Menkens, 18 Mo. 158; Brake *v.* Corning, 19 Mo. 125; Bell *v.* Ward, 10 R. I. 503. In Bell *v.* Ward, 10 R. I. 503, the defendant attempted to set off a claim on a *quantum meruit* for services rendered as an attorney. The court said: "To be the subject of set-off at law, the statute requires that the demand proposed to be set off should be liquidated, the amount of the demand ascertained and settled, or ascertainable by calculation, and without the necessity of other proof than of the liability." But see Sledge *v.* Swift, 53 Ala. 110, where a similar claim was allowed to be set off, the court defining unliquidated damages as those which rest in opinion merely, and saying that this claim was a proper set-off, because it was one recoverable in *indebitatus assumpsit*. As to the Alabama statute, see Eads *v.* Murphy, 52 Ala. 520.

(b) Best *v.* Hill, L. R. 8 C. P. 10; Rawson *v.* Samuel, 1 Cr. & P. 161.

be set off in an action on a single bill.([a]) And so in Pennsylvania and some other States by statute, unliquidated demands can be set off.([b])

In answer to a bill filed by the State of Maryland for the sale of a railroad under a mortgage of the property of the railroad company, given to secure the payment of an annuity to the State, the Court of Appeals, affirming the judgment below, refused to allow the company to set off or recoup damages sustained by the destruction of certain bridges of the railroad, made by the authorities of the city of Baltimore in the beginning of the late war, for the purpose of destroying communication between Baltimore and Pennsylvania, which act was approved by the governor and ratified by the legislature of the State, saying that there was no principle of discount, set-off, or recouper known to the court which would enable it to recognize the claim "as a debt, obligation, or liability for damages liquidated or unliquidated."([c])

The debts must be recoverable in an action *ex contractu*.([d]) In Allen *v.* U. S. ([e]) the plaintiff had obtained some bonds illegally, and had sold them. It was held that the proceeds might be the subject of set-off, as the defendant could waive the fraud and sue in an action *ex contractu*. In Hibbard *v.* Clark ([f]) it was held that taxes were not a debt, and hence were not a subject of set-off. The debts to be set off must be mutual and in the same right. Thus a stockholder in a corporation cannot set-off the money he owes for subscription to the capital

([a]) Halfpenny *v.* Bell, 82 Pa. 128.

([b]) Fessler *v.* Love, 43 Pa. 313; Halfpenny *v.* Bell, 82 Pa. 128; Morrison *v.* Lovejoy, 6 Minn. 319.

([c]) State *v.* Northern C. Ry. Co., 18 Md. 193.

([d]) Scammon *v.* Kimball, 92 U. S. 362.

([e]) 17 Wall. 207.

([f]) 56 N. H. 155.

stock against a debt due from the company to him, because the stockholders are considered as trustees, and the capital stock a trust fund for the benefit of creditors.[a] But in Hibbard *v.* Clark it was held that in trustee process the trustee could set off a debt due from the debtor, the court placing their decision on the ground that trustee process was an equitable proceeding. In Swindell *v.* Richey [b] it was held that in an action by a trustee a debt due from the beneficiary could be set off. Where the suit is by the assignee of a chose in action, the right to set-off is determined by the state of affairs at the time of the assignment. A debt not then due cannot be set off.[c] This was an action on a check. It was held that the check operated as an assignment of the drawer's funds in the bank, and the latter could not refuse to pay the check and claim to hold the funds to meet a note of the drawer held by it, but not due at the date of the check. Where the set-off is due at the time of the assignment, it is good against the assignee, as he takes subject to all equities then existing.[d]

§ 1032. **Equitable set-off.**—As the doctrine of set off was originally a doctrine of equity jurisprudence, transferred to the courts of law by statute, its application in a court of equity depends on the general principles of equity, and covers some cases not provided for by the statute. In general, however, the same principles govern in a court of equity as in a court of law. In Scammon *v.* Kimball [e] the complainant brought a bill in equity to have money due him from an insurance company on policies of insur-

[a] Sawyer *v.* Hoag, 17 Wall. 610; Scammon *v.* Kimball, 92 U. S. 362; Tobey *v.* Manufacturers' Nat. Bank, 9 R. I. 236.

[b] 41 Ind. 281.

[c] Fourth Nat. Bank *v.* City Nat. Bank, 68 Ill. 398.

[d] Bell *v.* Ward, 10 R. I. 503; *cf.* Nightingale *v.* Chafee, 10 R. I. 609.

[e] 92 U. S. 362, 367.

ance set off against his unpaid subscriptions to the capital stock, and moneys he held on deposit as the company's banker. Clifford, J., said:

"Whether the suit be one at law or in equity, set-off must be understood as that right which exists between two parties, each of whom, under an independent contract, owes an ascertained amount to the other to set off their respective debts by way of mutual deduction, so that, in any action brought for the larger debt, the residue only, after such deduction, shall be recovered. Courts of equity following the law will not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt; nor will such courts allow a set-off of debts accruing in different rights, except under very special circumstances and where the proofs are clear and the equity strong.

The judge then said that the capital stock was a trust fund, and hence a stockholder could not offset his unpaid subscription for stock, but that the money on deposit was a debt, and could be set off against the amount due on the policies. In Gray *v.* Rollo ([a]) the complainant filed a bill against the defendant as assignee in bankruptcy of an insurance company to have two notes made by himself and one Gaylord, and held by the defendant's assignor, set off against money due to himself and his brother on policies of insurance issued by the company. Bradley, J., after showing that the set-off was not authorized by the language of the bankrupt act, said:

"If it can be maintained at all, it must be upon some general principle of equity, recognized by courts of equity in cases of set-off. . . . . But we can find no such principle recognized by the courts of equity in England or this country, unless in some exceptional cases which cannot be considered as establishing a general rule."

After citing several exceptions to the rule that the debts must be mutual, he said:

([a]) 18 Wall. 629, 632.

"Other instances are given by way of illustration of the principle on which a court of equity will deviate from the strict rule of mutuality, allowing a set-off; all of them based on the idea that the justice of the particular case requires it, and that injustice would result from refusing it; but none of them approaching in likeness to the case before the court."

He then referred to Tucker *v.* Oxley,(a) which had been cited to support the plaintiff's claim, and said:

"In other words, the case of Tucker *v.* Oxley decides that a *joint indebtedness* may be proved and set off against the estate of either of the *joint debtors* who may become bankrupt, and the fact that it may be subject to be marshalled makes no difference. The joint debtors are severally liable *in solido* for the whole debt. But the case does not decide that a *joint claim*, that is to say, a debt due *to* several *joint creditors*, can be set off against a debt due *by* one of them. . . . . The debtor who owes a debt to several creditors jointly, cannot discharge it by setting up a claim which he has against one of those creditors, for the others have no concern with his claim, and cannot be affected by it; and no more can one of several joint creditors, who is sued by the common debtor for a separate claim, set off the joint demand in discharge of his own debt, for he has no right thus to appropriate it. Equity will not allow him to pay his separate debt out of the joint fund. And if he had the assent of his co-obligees to do this, it would be unjust to the suing debtor, because he has no reciprocal right to do the same thing."

In Blount *v.* Windley (b) the plaintiff, as commissioner for winding up the business of the Washington Bank, had sued and recovered judgment against the defendant. The latter obtained some of the circulating notes of the bank, and tendered them in payment of the judgment to the plaintiff, who refused to accept them. On motion, the court ordered the notes to be applied to the judg-

(a) 5 Cranch 34.

(b) 95 U. S. 173, 176.

ment, and from this order the plaintiff appealed. A statute of North Carolina authorized this proceeding, which the plaintiff claimed was unconstitutional, on the ground that he had a right to have his debt paid in legal-tender notes or coin. Miller, J., after saying that, as a general proposition, this was true, said :

"Notwithstanding this general rule, it is a principle of long standing in all systems of jurisprudence, that one debt or obligation may be set off or counterbalanced against another, so that, while the obligation of both is recognized, both are satisfied in law and discharged without the payment of any money on either ; and this is done by the courts without the consent of the party, and against his will. . . . . The courts of common law have long established the principle of set-off as applicable to mutual judgments in the same court. And it is said that this power of setting off judgments, not only in the same court, but in different courts, did not depend upon the statutes of set-off, but upon the general jurisdiction of the court over its suitors. . . . . This remedy has been very much extended in equity, where the insolvency of the judgment plaintiff, his non-residence within the jurisdiction of the court, the fact that the mutual obligations have grown out of the same transaction, and many other purely equitable considerations, have been held to authorize the setting off of many classes of obligations held by the defendant, against a judgment duly recovered against him in a court of law. It will be thus seen that, independent of statutes, the courts have long exercised the power of extinguishing judgments by compelling the plaintiff to receive something else than money in satisfaction thereof. It is true that, where this power has been exercised under the statutory or equity power of the court, it has been generally, perhaps universally, limited to cases where the defendant held the claim which he presents for set-off at the time the suit was brought, in which he proposes the set-off. But, undoubtedly, there may be cases in which a claim coming to the ownership of the judgment debtor, even after the judgment has been rendered against him, presents a strong equity to have it set off against that judgment. In such cases it must be within the competency of the legislative body so to extend the remedy by set-off as to embrace them."

§ 1033. **Difference between recoupment and set-off.**—The difference between recoupment and set-off is as follows: In the former, the defendant's claim must arise out of the same transaction as the plaintiff's, and no balance can be certified for the defendant; but the defendant's claim can be for liquidated or unliquidated damages. In set-off, the claims are independent, the cross-claim can only be for liquidated damages, and the defendant can have a balance certified in his favor.(a)

§ 1034. **Original meaning of recoupment.**—* Recoupment, or as it was orginally called, recouper, is a very ancient term of our law, but had at one period fallen into considerable disuse. It has been recently revived in this country, with, however, a material modification of its meaning. As far back as the reign of Henry VIII,[1] we find it laid down: "If a man disseize me of land, out of which a rent charge is issuant, which has been in arrear for several years, and the disseizor pay it; if the disseizee recover in an assize, the rent that the disseizor has paid shall be *recouped in damages.*" Lord Coke also says:[2] "If a man makes a lease for life rendering rent, or if there be lord and tenant by fealty and rent, and the rent is behind for two years, and afterwards the lessor, or the lord, disseizes the ter-tenant, and afterwards the tenant recovers against him in assize, and the rent which incurred during the disseizin is *recouped* in damages, yet the lord or lessor shall recover in the assize the arrearages before the disseizin, and the bar of the latter years is no bar of the arrearages before." And so he again says:[3]

[1] Oliver *v.* Emsonne, Dyer 1 b, 2 b.
[2] Pennant's Case, 3 Co. 64, 65 b.
[3] Coulter's Case, 5 Co. 30.

(a) Wheat *v.* Dotson, 12 Ark. 699; Waterman *v.* Clark, 76 Ill. 428; Vassear *v.* Livingston, 13 N. Y. 248; Boston Mills *v.* Ewell, 6 Abb. Pr. (N. S.) 319.

"And as to the case of *recouper in damages* in the case of rent service, charge, or seck, it was resolved that the reason of the recouper in such case is, because otherwise, when the disseizee re-enters, the arrearages of the rent service, charge, or seck would be revived; and therefore to avoid circuity of action—and *circuitus est evitandus, et boni judicis est lites dirimere, ne lis ex lite oriatur*—the arrearages during the disseizin shall be *recouped in damages*."[1] So, again,[2] where an appeal of mayhem was brought, and for the defense it was urged that the plaintiff had recovered in a previous action of trespass in assault and battery, and it was held a good bar, it is cited in the index as a case "where *recouper* of damages shall lie, because the plaintiff recovered in another action before."[3] And again,[4] if the feoffee or lessee of the second disseizor sows the land, or cuts down trees or grass, etc., and carries away, yet after the regress of the disseizee, he may take as well the corn as the trees, etc., to what place soever they are carried; and if the disseizee takes them, they shall be *recouped in damages* against the disseizor.[5]

In this same sense the phrase is used in a modern English case,[6] where suit was brought upon a policy on

[1] And in this case it was held that an executor *of his own wrong* could not recoup or retain out of goods in his own hands the amount of a debt due him by the decedent. In the case, however, above cited from Dyer, it was held that executors might pay the debts of the testator out of their own money, and retain so much of the effects of the testator as would be necessary to satisfy them; and this was held good under a plea of *plene administraverunt*.

Other cases of recouper or retention will be found referred to in this (Coulter's) case chiefly from the Year Books. See also, as to Recouper, a note to the case of Icely *v.* Grew, 6 Nev. & Man. 467.

[2] Hudson *v.* Lee, 4 Co. 43.

[3] So, again, in Slade's Case, 4 Co. 92, 94. But this is not a case of former recovery.

[4] Richard Liford's Case, 11 Co. 46, 51, 52.

[5] And in the same sense the maxim of the civil law is applied: *Nemo locupletior faciendus est ex aliena jactura.* So Grotius: *Minus autem quis habere ac proinde damnum fecisse intelligetur, non in re tantum, sed in fructibus qui propriæ rei fructus sunt, sive illi percepti sunt sive non, si tamen ipse eos percepturus fuerat, deductis impensis quibus res melior facta est aut quæ ad fructus percipiendos fuerunt necessariæ, ex regula quæ nos velat locupletiores fieri cum aliena jactura.* De Jur. Bel. et Pac. lib. ii, c. cxvii, § 4; Rutherforth's Institutes, book i, ch. 17.

[6] Godsall *v.* Boldero, 9 East 72. See

the life of Mr. Pitt. The plaintiffs had been creditors of Mr. Pitt, and insured his life for their own protection. After his death, however, the debt was paid by his executors out of moneys voted by Parliament to relieve his estate, and it was held that the plaintiffs could not recover, having received no damage; and in the case next cited, Lord Ellenborough likened this to a case of recoupment.[1]

So, where an action[2] was brought on a policy of insurance to Russia, with a provision that if the cargo were denied permission to be landed, the master, should, on his return, receive in London £2,500; the outward cargo was denied landing, but the master, instead of returning direct, went to Stockholm and earned freight. The plaintiff claimed to recover the £2,500; but it was held that the freight earned was to be *recouped*; and the principle of this case has been recognized in this country.[3]

Again, in a case of assumpsit by underwriters[4] on freight, after abandonment and payment of total loss, to recover freight earned after the abandonment, it was insisted by counsel *arguendo*, that whether entitled under the abandonment or not, the plaintiff ought to have his damages recouped *pro tanto*, out of the freight earned by the defendants on the homeward voyage.[5]

this case, cited with approbation in the Court of Errors in New York, Tyler *v.* Ætna Fire Ins. Co., 12 Wend. 507. It has been overruled in England. See Dalby *v.* India & London Life Ass. Co., 15 C. B. 365, on the ground that a contract of life assurance is not a contract of *indemnity*.

[1] Mr. Ellis says (Insurance, 126), that notwithstanding this decision, the office paid the amount before leaving court. It does not appear, but it may be supposed that the suit was brought for the benefit of the estate.

[2] Puller *v.* Staniforth, 11 East 232.

[3] Heckscher *v.* M'Crea, 24 Wend. 304. See, also, Costigan *v.* Mohawk & Hudson R.R. Co., 2 Denio 609.

[4] Barclay *v.* Stirling, 5 M. & Sel. 6.

[5] See, also, Richardson *arguendo*, in Williams *v.* London Ass. Co., 1 M. & Sel. 318, 323. And such is the definition given of the word in the Lexicons: "Recoup," says Jacobs (*in voc*), "from the French *Recouper*, signifies the keeping back or stopping something which is due, and in our law we use it for *defaulk* or *discount*." The term *defaulk* is almost everywhere obsolete, and is only known now through the substantive *defalcation* used in promissory notes in Pennsylvania to signify deduction;

Thus, it is evident that *recouper* or *recoupment*, in its original sense, was a mere right of deduction from the amount of the plaintiff's recovery, on the ground that his damages were not really as high as he alleged.[1]

§ 1035. **Modern sense of the term.**—But this is not the sense in which the phrase has been lately used with us in this country. In Mr. Barbour's valuable compilation on the law of set-off, he says (p. 26):

"Before entering upon the subject of set-off more minutely, it will be proper to notice a species of defense somewhat analogous to it in character, which a defendant is in some cases allowed to make, and which is called *recoupment*. This is where the defense is not presented as a matter of set-off arising on an independent contract, but for the purpose of reducing the plaintiff's damages, for the reason that he himself has not complied with the cross obligations arising under the same contract. Thus, in an action to recover compensation for services rendered, the employer is entitled to show, by way of *recoupment* of damages, loss sustained by him through the negligence of the person employed; and so in regard to a breach of warranty."

Mr. Barbour is unquestionably right in the fact he states, that *recoupment* is thus used; but it is equally certain that this is an entirely new application of the word, and that while it originally merely implied a deduction from the plaintiff's demand, arising from payment in whole or in part, or from recovery, or some analogous fact, it is now understood to embrace counter-claims of the defendant, and to be, in short, a kind of irregular and unliquidated set-off, which has crept in notwithstanding the rigorous terms of the statute. It is always desirable to use

and discount has become appropriated almost exclusively to banking operations. Defalk, however, as a verb, is also still used in legal parlance in the same State. Owens *v.* Salter, 38 Pa. 211; Norcross *v.* Benton, 38 Pa. 217; Deen *v.* Herrold, 37 Pa. 150.

[1] And so, too, it appears from Viner's Abridgment, where various uses of the term, in its ancient sense, will be found under the head of Discount: Pl. 3, 4, 9, and 10.

technical terms in their strict signification ; but leaving this to those who alone are competent to set us right in the matter, we propose now to consider the law of recoupment in its broader, and, as we must think, less correct interpretation. It will be better understood from a careful examination of the cases.

§ 1036. **Early English rule.**—It was originally held in England, that, in actions for work and labor, negligence, or badness of materials, constituted no defense to an action for the stipulated sum ; that the plaintiff was entitled to his contract price, and that the defendant must resort to his cross-action for the damages resulting from the negligence.[1] But this law was very soon overruled.

In an action of assumpsit for work and labor,[2] the plaintiff, a carpenter, had been employed by the defendant, a farmer, to do some work on his farm buildings ; no particular sum had been agreed on. The defendant offered to prove that the work had been done in an improper and insufficient manner ; to which it was replied on behalf of the plaintiff, that this was no answer to the present action, but the subject of a cross suit ; and at Nisi Prius it was so ruled, and the plaintiff had a verdict for his full demand. But on motion for a new trial, this was held wrong ; and Lord Ellenborough, C. J., said :

"Where a *specific* sum has been agreed to be paid by the defendant, the plaintiff may have some ground to complain of surprise if evidence be admitted to show that the work done and materials provided were not worth so much as was contracted to be paid, because he may only come prepared to prove the agreement for the specific sum and the work done, unless notice be given to him that the payment is disputed on the ground of the inadequacy of the work done. But where a plaintiff comes

[1] Broom *v.* Davis, Duffit *v.* James, Cormack *v.* Gillis, and Morgan *v.* Richardson, cited in Basten *v.* Butter, 7 East 479.

[2] Basten *v.* Butter, 7 East 479, 483.

into court upon a *quantum meruit*, he must come prepared to show that the work done was worth so much, and therefore there can be no injustice in suffering this defense to be entered into, even without notice."

Lawrence, J., said that even if a *specific sum* had been agreed to be paid, and notice given, then the defendant should be let into the defense.

"For, after all, considering the matter fairly, if the work stipulated for at a certain price were not properly executed, the plaintiff would not have done that which he engaged to do, the doing which would be the consideration of the defendant's promise to pay, and the foundation on which his claim to the price stipulated for would rest; and, therefore, especially if he should have notice that the defendant resists payment on that ground, he ought to come prepared with proof that the work was executed properly."

And the rule for a new trial was made absolute. Shortly afterwards, in an action[1] of assumpsit for work and labor, plea non assumpsit, the defendant showed that the work (the rebuilding the front of a house) was ill done; to which it was insisted that the only remedy was by cross-action. But Lord Ellenborough said: "The plaintiff is to recover what he deserves. . . . . I have had a conference with the judges; and I consider this as the correct rule, that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence"; and there was a verdict for defendant.

Again,[2] where the plaintiff declared on a contract by which the defendants were to furnish beer to be shipped for Gibraltar; and alleged, by way of breach, that the

[1] Farnsworth *v.* Garrard, 1 Camp. 38. [2] Fisher *v.* Samuda, 1 Camp. 190.

beer was bad and wholly unfit for shipment, it appeared that the plaintiff had previously paid the defendants for the price of the beer, in a suit in which judgment had been allowed to go by default. Lord Ellenborough said: "It appears to me that you should have made your defense to the original action, and given in evidence the bad quality of the article supplied, either as an answer to the whole demand, or in abatement of the damages. There was formerly an opportunity to do final justice between the parties, and why should there now be a second litigation?"[1]

A distinction was originally taken in England, between actions brought for the original contract price, and suits founded on a note and bill given for the price, as we have seen above, in Basten *v.* Butter. So in two cases at Nisi Prius,[2] Lord Ellenborough refused to admit evidence in actions on bills of exchange to show that the consideration had partially failed, the provisions for which the bills were given being very inferior to what they should have been. In the latter case, he said: "A bill of exchange cannot be accepted on a *quantum meruit*. There is a difference between want of consideration and failure of consideration. The former may be given in evidence to reduce the damages; the latter cannot, but furnishes a distinct and independent cause of action"; and he cited, with approbation, the opinion of Mr. Justice Denison, in Robinson *v.* Bland:[3] "There is a distinction between the contract and the security. If

[1] The cause was allowed to go on, but turned on another point. In Lewis *v.* Cosgrave, 2 Taunt. 2, the ingredient of fraud was superadded. It was a suit brought on a check for £15, which had been given for a horse warranted sound, and which the plaintiff knew to be unsound. At the trial, Heath, J., held that the defendant was bound to pay the bill, and bring his action for the deceit; but on a motion for a new trial, the court held, "that as it was clearly a fraud; and as a man cannot recover the price of goods sold under a fraud, the rule for a new trial should be made absolute."

[2] Morgan *v.* Richardson, 1 Camp. 40, *in notis;* Tye *v.* Gwynne, 2 Camp. 346.

[3] 2 Burr. 1077, 1082.

part of the contract arises on a good consideration, and part of it upon a bad one, it is divisible. But it is otherwise as to the security, that being entire." This distinction, however, we shall see, has been disregarded in the modern cases.

§ 1037. **Conflict in English cases.**—In other respects, also, the earlier English decisions were inharmonious. In an action [1] brought to recover the amount of a surgeon's bill, Lord Kenyon permitted the defendant to give evidence of unskilful treatment of him by the plaintiff, taking the distinction between a demand for skill, where the question might be whether the plaintiff was entitled to anything or nothing, and where the action was for goods sold and delivered, or other certain thing of value, not depending on skill; and considering the case before him as a mixed question, where the demand was in part for skill and part for medicine.

But the Court of Common Pleas held,[2] that, in an action on an attorney's bill, negligence could not be set up as a defense, unless possibly it was such as to deprive the defendant of all possible benefit. The negligence consisted in neglecting to oppose the justification of bail. The bail had been proceeded against, but fruitlessly. Sir James Mansfield, C. J., said:

"In declaring that the plaintiff is entitled to recover, I do not go the length of saying that in no case of this kind can negligence in the party suing be used as a defense to the action; though I think it can only be used when the negligence has been such, that the party for whom the work was done has thereby lost all possibility of benefit from such work. That cannot be said in the present case."

And final judgment was given for the plaintiff. **

[1] Duffit *v.* James, cited in Basten *v.* Butter, 7 East 479.

[2] Templer *v.* McLachlan, 2 B. & P. N. R. 136.

§ 1038. **Modern English rule.**—In England, even by the modern cases, the wide rule, which we shall presently see is adopted in this country, has been but partially recognized.[1] * In an action of assumpsit for goods sold, brought to recover the price of some cinq foin seed, warranted by the plaintiff to be good, new-growing seed, it was held competent for the defendant to show that it did not correspond with the warranty. The plea was the general issue without notice, but the defense went to the whole action. And in assumpsit[2] for a horse sold, the plaintiff having warranted him, it was held that the defendant had a right to give the breach of warranty in evidence, in reduction of damages. Again,[3] where the work was imperfectly done, for an agreed sum, Vaughan, B., said: "I think the rule that there should be an abatement of price for the non-performance of any part of the contract by the plaintiff, is a convenient rule."

But, in other cases, the rule has not been adhered to.[4] It has been held, indeed, that an attorney cannot recover against his client for work which was useless towards accomplishing the object which the client had in view.[5] But in a later case,[6] the rule of Templer *v.* McLachlan, above cited, was reaffirmed ; and it was held that if the work was only partly useless, the client's remedy was by a cross-action. It is worthy of remark, however, that in none of these cases is the term *recoupment* applied to a defense growing out of the defendant's counter-claim. It is uniformly restricted in England, we believe, to that limitation of the plaintiff's demand which shows that he has really not suffered the loss which he alleges.

[1] Poulton *v.* Lattimore, 9 B. & C. 259.

[2] Street *v.* Blay, 2 B. & A. 456.

[3] Allen *v.* Cameron, 1 Cr. & M. 832, 841.

[4] Hill *v.* Featherstonhaugh, 7 Bing. 569.

[5] See, also, Bracey *v.* Carter, 12 A. & E. 373, where the same principle was recognized.

[6] Shaw *v.* Arden, 9 Bing. 287.

In a case in the English Exchequer,[1] the whole subject was considered by that court. The suit was special assumpsit on a contract to build a ship for the plaintiff according to certain specifications; and the breach charged, that the work was insufficiently done, by reason of which the plaintiff had been obliged to refasten and repair her. The defendant pleaded a former suit brought by himself for the contract price, in which the now plaintiff gave evidence of the same breach of contract as that alleged in the present declaration; and averred that the jury deducted the compensation due the now plaintiff in that suit. The plea was held bad, substantially on the ground that in the former action the plaintiff could only have been allowed a deduction of damages from the agreed price so far as the ship fell short of the contract at the time of delivery, and not for subsequent repairs. Parke, B., said:

"The ground on which it was endeavored to support the plea, in a very ingenious argument, was this: That a defendant in an action for the stipulated price of a chattel, which the plaintiff had contracted to make, for the defendant, of a particular quality, or of a specific chattel sold with a warranty, and delivered, had the option of setting up a counter-claim, for breach of the contract in the one instance or the warranty in the other, in the nature of a cross-action; and that if he exercised that option, he was in the same situation as if he had brought such an action, and consequently could not, after judgment in one action, bring another; and the case was likened to a set-off under the statutes. This argument was founded on no other authority than an expression of Lord Tenterden, in giving the judgment of the court in the case of Street *v.* Blay; his lordship having said that a breach of warranty might be given in evidence in an action for the price of a specific article sold, in mitigation of damages, 'on the principle, it should seem, of avoiding circuity of action.' But we are all of opinion that no such inference is

[1] Mondel *v.* Steel, 8 M. & W. 858, 869.

to be drawn from that expression. What was meant was, that the sum to be recovered for the price of the article might be reduced by so much as the article was diminished in value by reason of the non-compliance with the warranty ; and that this abatement was allowed in order to save the necessity of a cross-action. Formerly, it was the practice, where an action was brought for an agreed price of a specific chattel sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract ; in which action, as well the difference between the price contracted for and the real value of the articles, or of the work done, as any consequential damage, might have been recovered; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant, who received the chattel warranted, has thereby the property vested in him indefeasibly, and is incapable of returning it back; he has all that he stipulated for as the condition of paying the price, and, therefore, it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price ; and, therefore, the defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of Basten *v.* Butter, a different practice, which had been partially adopted before in the case of King *v.* Boston, began to prevail, and being attended with much practical convenience, has been since generally followed ; and the defendant is now permitted to show that the chattel, by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value (Kist *v.* Atkinson, Thornton *v.* Place, etc.). The same practice has not, however, extended to all cases of work and labor, as, for instance, that of an attorney (Templar *v.* McLachlan), unless no benefit whatever has been derived from it ; nor in actions for freight (Sheels *v.* Davies). It is not so easy to reconcile these deviations from the ancient practice with principle in those particular cases above mentioned, as it is

in those where an executory contract, such as this, is made for a chattel to be manufactured in a particular manner, or goods to be delivered according to a sample (Germaine *v.* Burton), where the party may refuse to receive, or may return in a reasonable time, if the article is not such as bargained for; for in these cases the acceptance, or non-return, affords evidence of a new contract on a *quantum valebat*; whereas, in a case of a delivery with a warranty of a specific chattel, there is no power of returning, and consequently no ground to imply a new contract; and in some cases of work performed there is difficulty in finding a reason for such presumption. It must, however, be considered that in all these cases, of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set off by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more.

"The opinion, therefore, attributed on this record to the learned judge is, we think, incorrect and not warranted by law; and all the plaintiff could by law be allowed in diminution of damages on the former trial, was a deduction from the agreed price, according to the difference at the time of the delivery between the ship as she was, and what she ought to have been according to the contract; but all claim for damages beyond that, on account of the subsequent necessity for more extensive repairs, could not have been allowed in the former action, and may now be recovered."[1] **

§ 1039. **The rule in the United States.**—* The Supreme Court of the United States at one time laid down the

[1] For other English cases, see Leggett *v.* Cooper, 2 Stark. 103; Kist *v.* Atkinson, 2 Camp. 63; Okell *v.* Smith, 1 Stark. 107; White *v.* Chapman, Id. 113; Denew *v.* Daverell, 3 Camp. 451; Sheels *v.* Davies, 4 Camp. 119; Caswell *v.* Coare, 1 Taunt. 566; 2 Id. 107; Montriou *v.* Jefferys, 2 C. & P. 113; Hamond *v.* Holiday, 1 C. & P. 384; Bamford *v.* Harris, 1 Stark. 343.

restricted rule.[1] It was an action of assumpsit brought to recover the amount of a note given for a race-horse, and which the defendant offered to prove was unsound at the time of sale. The judge held that the evidence was inadmissible, unless the plaintiff at the time of the sale knew of the unsoundness, or, in other words, was guilty of fraud. This doctrine was held correct, and the court said :

"The result of the cases is this : if upon sale with a warranty, or if by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and, in that case, the contract is rescinded and at an end, which is a sufficient defense to an action brought by the vendor for the purchase-money, or to enable the vendee to maintain an action for money had and received in case the purchase-money has been paid. The consequences are the same where the sale is absolute and the vendor afterwards consents unconditionally to take back the property ; because in both, the contract is rescinded by the agreement of the parties, and the vendee is well entitled to retain the purchase-money in the one case, or to recover it back in the other. But if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time."

The whole subject was, however, later re-examined by the same high tribunal, in a case coming up from Alabama, in which, although it was decided upon the local law of that State, the reasonableness of the doctrine," that upon the principles of justice and convenience, and with a view to prevent litigation and expense, where fraud has occurred, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent

[1] Thornton *v.* Wynn, 12 Wheat. 183, 193.

or otherwise, all or any of these facts may be relied on in defense by a party when sued on such contract, and that he shall not be driven to a cross-action," was ably and elaborately maintained.[1] **

* In New York, the subject we are now considering was largely discussed,[2] and the rule definitively settled.

The plaintiff, a stove-dealer, sued the defendant for the price of a patent cooking-stove, and sundry other articles. The defendant gave notice with his plea, that he would prove that the plaintiff warranted the stove to draw and cook well; that it did not answer the warrranty; that he had offered to return it; but that the plaintiff refused to take it back. It was not pretended that there was any fraud. This evidence was rejected, on the ground that unliquidated damages for a breach of warranty cannot be set off (no fraud being shown) in an action of assumpsit. The jury found for the plaintiff his whole demand. Judgment, and error. It was contended in the Supreme Court, for the defendant in error, that a partial failure of consideration, unless occasioned *by the fraud* of the plaintiff, could not be given in evidence in reduction of the damages. But Mr. J. Marcy, in delivering the opinion of the court, said (p. 492):

"From an examination of the cases, I am satisfied that in those where the damages, arising from a breach of warranty in the sale of chattels, have been allowed to be given in evidence by the defendant to reduce the amount of recovery below the stipulated price, the decisions of the court have not proceeded on the ground that the express contracts were *void* by reason of fraud, and that the recovery was had upon a *quantum meruit*, or *quantum valebat*, upon implied contracts, but upon a principle somewhat different from either of those adverted to in this case by the court below, upon a principle which has of late years been gaining favor

[1] Withers *v.* Greene, 9 How. 213; and same doctrine affirmed in Van Buren *v.* Digges, 11 How. 461.

[2] M'Allister *v.* Reab, 4 Wend. 483.

with courts, and extending the range of its operations. Such defense is admitted, to avoid *circuity of action*. A second litigation on the same matter, should not be tolerated when a fair opportunity can be afforded by the first, to do final and complete justice to the parties. If a defense resting on such a principle is allowed, as I think it is, in a case of a warranty *mala fide*, I see no good reason for not allowing it in a case of a warranty *bona fide*. The effect would be as salutary, and the inconveniences arising therefrom would be as few in the one case as in the other. The distinction contended for on the part of the defendant here, is recognized, I admit, in many cases, and some of them of high authority; but in others and those mostly of a more recent date, it seems to me to have been disregarded. . . . . I am persuaded that if we should circumscribe the operation of the rule in the manner contended for by the defendant in error here, we should limit its usefulness; but by extending it to cases of sale on warranty without fraud, we shall thereby curtail litigation, without creating confusion by encroachments upon established principles of law. I am therefore of opinion that the court below erred in refusing the evidence offered by the defendant."

And the judgment was reversed. The same case came up before the Court of Errors;[1] when Mr. Chancellor Walworth, in giving his reasons for affirmance, said:

"I consider the rule adopted on this subject perfectly just and equitable, when the plaintiff has notice of the defense intended to be set up, and calculated to do complete justice between the parties, without putting them to the expense of two suits, where one is much more likely to effect the object of fair litigation. Indeed, if one of the parties is insolvent, and the other responsible, it is the only way in which justice can be done; at least as to small demands which will not bear the expense of a suit in chancery to obtain an equitable set-off."

He also said that the distinction taken in England between a suit on the original contract and a suit upon a note or any other security taken for the contract price,

[1] Reab *v.* M'Alister, 8 Wend. 109, 117.

had not been adopted by the courts of New York. The judgment was affirmed.**

The doctrine of recoupment in its broader sense is now established in most of the jurisdictions of this country; but a few recognize it either not at all or to a very limited extent. Thus in North Carolina recoupment is only allowed where the action is on the common counts, and then only to the extent of showing the actual value of the goods sold.(a) In New Jersey the consideration of an unsealed agreement may be shown to have failed, in whole or in part; but recoupment in any broader sense is not allowed.(b) In Tennessee the doctrine has been introduced to but a limited extent. It has been declared applicable only to cases where a special contract has been partially executed, but not according to its terms. Here the defendant is liable to the plaintiff, not on the special contract, but on an *indebitatus assumpsit*, for so much as the defendant may be found liable *ex æquo et bono* to pay for the partially or defectively executed contract; and in such case in order to ascertain what the defendant does, *ex æquo et bono*, really owe, he shall be allowed by way of recoupment such damages as he has sustained by reason of the non-performance of the contract, as it was entered into by the plaintiff, and which he could recover by a cross-action.[1] But on an executed contract, as in debt or *indebitatus assumpsit*, for the price of a slave sold and delivered, the defendant cannot recoup the damages accruing by reason of a breach of warranty.[2] So

[1] Porter *v.* Woods, 3 Humph. 56; Crouch *v.* Miller, 5 Humph. 586.

[2] Henning *v.* Van Hook, 8 Humph. 678.

(a) Hobbs *v.* Riddick, 5 Jones 80; McDugald *v.* McFadgin, 6 Jones 89.

(b) Price *v.* Reynolds, 39 N. J. L. 171; Wakeman *v.* Illingsworth, 40 N. J. L. 431; Hunter *v.* Reiley, 43 N. J. L. 480. Except by statute, and then the defense must be pleaded: Bozarth *v.* Dudley, 44 N. J. L. 304.

where an engineer sues for his stipulated salary, damages sustained by his employer, by reason of his unskilful performance of his duties, cannot be set off.[1] In Pettee *v.* Tenn. Mfg. Co.([a]) it was said that the damages permissible, by way of recoupment, must be capable of computation with reasonable certainty, and such as the defendant might recover in a cross-action. But in Overton *v.* Phelan ([b]) the court said: "It is well settled upon common-law principles that where the defendant has sustained damages by reason of the plaintiff's non-performance of his part of the agreement sued on, such defendant has the right to abate the plaintiff's verdict and recovery by the amount of . . . . the damages which he would be entitled to recover in a cross-action by him against the plaintiff, for the non-performance of his portion of the agreement."

In several jurisdictions in this country recoupment has been superseded by the statutory right of counter-claim, which includes both set-off and recoupment.([c]) Thus in New York the right of counter-claim was established by the Code of Procedure (§ 149), and thus defined (§ 150):

The counter-claim must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action and arising out of one of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint, as the foundation

[1] Nashville & K. T. Co. *v.* Harris, 8 Humph. 558; Allen *v.* McNew, 8 Humph. 46.

([a]) 1 Sneed 381.

([b]) 2 Head 445.

([c]) So, for instance, in Missouri, New York, Ohio, Wisconsin. In Pennsylvania a Defalcation Act, and a similar act in Virginia, both passed before the Revolution, take the place of the common-law right of recoupment.

of the plaintiff's claim or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action.

These enactments have been substantially repeated in most of the other States which have adopted codes of practice, and under the provisions of law and rules of court requiring the different counter-claims to be separately and clearly stated, it is believed that the avoidance of circuity and variety of action has been found to more than counterbalance the advantage so long attributed to the logical simplicity of issues which was the aim of the common-law practice. The same provisions have been substantially re-enacted in New York, in the Code of 1877, called "The Code of Civil Procedure."[a]

§ 1040. **Principle on which the doctrine is founded.**—The doctrine of recoupment appears to have arisen in large part from the doctrine that partial failure of consideration is a defense *pro tanto*.[b] The true theory, however, would seem to be that recoupment is an application of the equitable doctrine of avoiding circuity of action. This double origin of the doctrine leads to some confusion

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[a] § 501.

[b] Peden *v.* Moore, 1 Stew. & Port. 71; Davis *v.* Wait, 12 Ore. 425; Sumter *v.* Welsh, 2 Bay 558. In Lufburrow *v.* Henderson, 30 Ga. 482, 484, Stephens, J., said: "The comparatively modern doctrine of *recoupment* is but a liberal and beneficent improvement upon the old doctrine of failure of consideration. It looks through the *whole* contract, treating it as an entirety, and treating the things done, and stipulated to be done on each side, as the consideration for the things done, and stipulated to be done, on the other. When either party seeks redress for the breach of stipulations in his favor, it *sums up* the grievances on each side, instead of the plaintiff's side only, strikes a balance, and gives the difference to the plaintiff, if it is in his favor."

in the cases even in the same jurisdiction. In New York, in the case of Gillespie *v.* Torrance,[a] it was decided that the right did not depend upon the principle of failure of consideration, but that the agreements on both sides remain in full force, and the damages are set off against each other. The action was against the accommodation indorser of a note given for the price of timber, and the defense alleged was breach of warranty. Selden, J., said, that if the right of recoupment depended upon a failure of consideration, the indorser could show it if the maker could do so; but if the defense was to be regarded as a setting off of distinct causes of action, then the defendant could not avail himself of it, as there was no cause of action in his favor on the warranty. He then said:

"A careful examination of the subject, I think, must lead to the conclusion, that wherever recoupment, strictly such, is allowed, distinct causes of action are set off against each other. This would seem to follow from the right of election, which all the cases admit the defendant has, to set up his claim for damages by way of defense, or to resort to a cross-action to recover them. In many cases the defendant's damages would exceed the amount of the plaintiff's claim, which shows conclusively that such damages do not rest upon a mere failure of consideration. Where there is fraud, the party deceived, on discovering the fraud, may rescind the contract; but if he does not do that, the contract on his part remains entire, not broken and not modified, and he is bound to perform it fully according to its terms: he has, however, arising from the fraud, a distinct cause of action, the amount of which he may set off against any liability on his part growing out of the transaction in which the fraud was perpetrated. As was said by Bronson, J., in Van Epps *v.* Harrison:[b] 'When sued for the price, the vendee may in general recoup damages; but while he retains the property, he cannot treat the contract as wholly void, and refuse to pay any-

[a] 25 N. Y. 306, 309.
[b] 5 Hill 66.

thing. By retaining the property he *affirms the validity of the contract*, and can be entitled to nothing more than the damages which he has sustained by reason of the fraud.' The same principle is applicable to cases of warranty, except that the breach of warranty gives no right to rescind unless there is an express contract to that effect. In ordinary cases of breach of warranty, therefore, both contracts remain binding to their full extent; and where recoupment is allowed, damages for a breach on one side are set off against like damages on the other side."

In McKnight *v.* Devlin,[a] an action on a note given for property, the title to which had partially failed, Allen, J., said:

"The defendant had the benefit of his purchase in respect to a small part of the property which he sold before the seizure by the government; and there was, therefore, but a partial failure of consideration. As between the payee and maker of the notes, a total failure of consideration would have been an absolute bar to an action; and a partial failure a defense *pro tanto*. The maker would have been at liberty to recoup his damages by reason of the failure of title to a part of the property, in an action upon the notes. . . . . The right of recoupment is distinguishable from a mere right of set-off. It corresponds with the reconvention of the civil law, in which the defendant was permitted to exhibit his claim against the plaintiff, provided it arose out of, or was incidental to, the plaintiff's cause of action. . . . . It is optional with a defendant whether he will recoup his claim growing out of the same contract upon which the action is brought, or resort to an independent action."

In Price *v.* Reynolds[b] the defendant, in an action of covenant for rent, alleged a breach of covenant by the lessor in leasing other premises for certain excepted uses. Beasley, C. J., in sustaining a demurrer to the plea, said:

"In suits in this State on unsealed contracts, it was always allowable to rebut the consideration, either in whole or in part,

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[a] 52 N. Y. 399, 401.
[b] 39 N. J. L. 171.

but the damages of the defendant could not in such proceedings be recouped. In recoupment, a breach of the contract in suit, alleged to have been committed by the plaintiff, is set off against the alleged breach of another stipulation in the same contract forming the basis of the suit. Nothing of this kind occurs when the defendant sets up a failure of consideration."

In Wakeman *v.* Illingsworth ([a]) the plaintiff sued on a bond given for the price of land. The defendant alleged that the plaintiff had fraudulently misrepresented to him the amount he had expended in improvements. In speaking of the allowance of a plea of failure of consideration, Depue, J., said :

"The whole object intended to be effected by allowing such a defense, is to arrive at the real value of the article furnished, and it cannot be allowed to answer the purposes of a cross-action beyond this ; nor to serve the purpose of the recovery of other damages which are merely consequential, as, for instance, the loss of a bargain for the resale of the goods, or the expenses of repairs made necessary because of the failure to build a vessel according to the specifications. . . . . In the present case, the defense proposed disclosed no imperfection or infirmity in the consideration of the obligation sued on. The defendant obtained, in fact, exactly what he bargained for. . . . . His effort is to have the consequential damages resulting from the fraud complained of, allowed to him in this action. This is recoupment. . . . . And recoupment is not allowed in this State on obligations of the class sued on. The fraud complained of did not relate to matters of fact, that, in the remotest degree, entered into the intrinsic value of the property in question."

In Harrington *v.* Stratton,([b]) an action on a promissory note given for a horse, the defendant alleged false representations as to its condition. Dewey, J., treated the plea as one of partial failure of consideration, and held that it might be shown in reduction of damages. In

([a]) 40 N. J. L. 431, 433.

([b]) 22 Pick. 510.

Stacy *v.* Kemp [a] the defendant sued on a promissory note given for the sale of a milk route, the vendor agreeing not to sell milk on this route. The defendant offered to prove a breach of this agreement, but the trial judge excluded it. On exceptions, the Supreme Court overruled the court below, Chapman, J., saying: "Evidence that the plaintiff has interfered with the route in the manner stated, would tend to show that he has deprived the defendant of a part of the consideration for which the note is given. It was formerly held that such damages must be recovered by a cross-action, and could not be proved and allowed in defense of an action on the note, by way of recoupment. But the doctrine of recoupment of damages was fully established in this court, in Harrington *v.* Stratton." In Hodgkins *v.* Moulton [b] the declaration was for a balance due on a promissory note, and the defendant pleaded that, as to this balance, he engaged to pay it on the plaintiff's representation that he could collect it of one Littlefield, and that he should not be liable for it until he could so collect it; that Littlefield had become bankrupt, and so he had never received any consideration for it. On demurrer to the answer, Colt, J., saying that the plea was one of want of consideration, held that the answer could not be sustained. He drew a distinction between want and failure of consideration; the latter occurring when the consideration is good at the time the promise is made, but afterwards fails. In this case, he said, there was no want of consideration, as alleged, as the executory promise of the plaintiff was sufficient consideration for the note. He then said that total failure of consideration might always be shown in defense, but partial failure only when ascertained and

[a] 97 Mass. 166.
[b] 100 Mass. 309.

liquidated, unless properly pleaded and offered as evidence in reduction of damages in certain cases—that a partial *want* of consideration was always a defense *pro tanto*. The judge then considered the question of the allowance of the matter alleged in the answer, as matter of recoupment. After remarking that the case must be distinguished from those cases where the defendant is allowed to allege and prove breach of warranty or fraud in the sale of goods in an action on a note given in payment, he said: "It may be that, under the tendency of these decisions, a failure to perform an executory contract forming the consideration for a note may, when properly set forth in the answer, be given in evidence as an equitable set-off of damages by way of recoupment and to avoid circuity of action. But clearly such defense must be specially stated in the defendant's answer." It may now be regarded as settled, in spite of the contrary opinion of some judges, that recoupment rests on the doctrine of avoiding circuity of action.[a]

§ 1041. **Claim recouped must be recoverable in action.**—It follows from the fact that recoupment is based on circuity of action, that a defendant can recoup nothing that he could not recover in an action. Therefore where a minor buys a cart, and afterwards avoids the sale and brings action to recover the price he paid for it, the seller cannot recoup the value of the use of the cart, since no action would lie for it.[b] For the same reason, no claim

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[a] Dushane *v.* Benedict, 120 U. S. 630; Peden *v.* Moore, 1 Stew. & Port. 71; Flint *v.* Lyon, 4 Cal. 17; Schuchmann *v.* Knoebel, 27 Ill. 175; Piper *v.* Menifee, 12 B. Mon. 465, 468; Miller *v.* Gaither, 3 Bush 152; Hammatt *v.* Emerson, 27 Me. 308, 324; Home Savings Bank *v.* Boston, 131 Mass. 277, 280; Ward *v.* Fellers, 3 Mich. 281, 287; Nelson *v.* Johnson, 25 Mo. 430; Hoe *v.* Sanborn, 3 Abb. N. S. 189; Timmons *v.* Dunn, 4 Oh. St. 680; Sumter *v.* Welsh, 2 Bay 558.

[b] McCarthy *v.* Henderson, 138 Mass. 310.

for recoupment will be entertained where the loss is remote.[a] It results further that the claim recouped should be against the plaintiff,[b] and against him alone.[c] So in an action for freight by the owners of a vessel, one of whom was the master, damages for the non-delivery of goods called for by the bills of lading, which the master had signed, cannot be recouped.[d] In Fessenden *v.* Forest Paper Co.[e] the plaintiff had repaired certain machines for the defendant. He had been a member of the firm which originally made the machines. It was held, in an action by the plaintiff for his services, that the defendant could not recoup for defects in the original construction. And where there are several plaintiffs, a claim against some of them only cannot be recouped. So where two gave a vote for the price of property purchased by one of them, damages for false representations in the sale cannot be recouped.[f] So damages against a sheriff for a false return on the writ, in an action of replevin, cannot be recouped against the damages recovered by the officer on the replevin bond, which, under the Massachusetts general statutes (General Statutes, 143, § 15), would be held by the officer in trust after paying his own fees and expenses for the benefit, both of the attaching creditor and of his debtor.[g] But in New

[a] Smith *v.* Osborn, 143 Mass. 185; Turner *v.* Gibbs, 50 Mo. 556.

[b] Van de Sande *v.* Hall, 13 How. Pr. 458.

[c] Coolidge *v.* Burnes, 25 Ark. 241. "The claim for damages shall be against the plaintiff, so that their allowance by way of set-off or defense to the contract declared on shall operate to avoid circuity of action, and as a substitute for a distinct action against the plaintiff, to recover the same damages as those relied on to defeat the action." Bigelow, C. J., in Sawyer *v.* Wiswell, 9 All. 39.

[d] Sears *v.* Wingate, 3 All. 103.

[e] 63 Me. 175.

[f] King *v.* Wise, 43 Cal. 628; but *contra*, M'Hardy *v.* Wadsworth, 8 Mich. 349.

[g] Wright *v.* Quirk, 105 Mass. 44.

York it is held that an agent who is sued on a claim for which he has made himself liable, can recoup any claim which his principal would have arising out of the contract on which the agent is liable.(a) A case in Connecticut is in conflict with the principle stated. In that case it was held that a claim could be set up in recoupment, though action upon it would be barred by the statute of limitations.(b)

§ 1042. **Recoupment confined to subject-matter of action.** —* It is to be observed, however, that the right of recoupment is limited to damages resulting from the same subject-matter for which the action is brought.[1](c) So where there are distinct sales, they cannot be regarded as one transaction, so as to entitle the defendant, in an action for the price of the last parcel delivered, to recoup his damages growing out of the previous deliveries.[2] So, too, for damages not arising out of the contract of the parties, and entirely independent of their respective covenants or agreements, there can be no recoupment; thus in an action for rent upon a lease which provided for the landlord's entering on the premises to make repairs during the term, the tenant cannot recoup damages occasioned by negligent and tortious behavior of the landlord and his servants in making such repairs.[3] **

[1] In Pennsylvania, damages arising from a breach of warranty of goods sold, may be set off under the statute of that State in an action on a note given *in a different transaction*. Phillips *v.* Lawrence, 6 Watts & Serg. 150; Carman *v.* Franklin Fire Ins. Co., 6 Watts & Serg. 155.

[2] Seymour *v.* Davis, 2 Sandf. 239.

[3] Cram *v.* Dresser, 2 Sandf. 120.

(a) Elwell *v.* Skiddy, 77 N. Y. 282.

(b) Beecher *v.* Baldwin, 55 Conn. 419.

(c) Evans *v.* Hughey, 76 Ill. 115; Simmons *v.* Haas, 56 Md. 153; Sawyer *v.* Wiswell, 9 All. 39; Home Savings Bank *v.* Boston, 131 Mass. 277; Brighton Bank *v.* Sawyer, 132 Mass. 185; Molby *v.* Johnson, 17 Mich. 382; Morehouse *v.* Baker, 48 Mich. 335; Rens *v.* Grand Rapids, 73 Mich. 237; Haldeman *v.* Berry, 74 Mich. 424.

Where a lessee borrowed money of a lessor, to be repaid by adding it to the rent, and before the money was fully paid the lessor terminated the lease under a power reserved in the lease, in an action of trover for goods illegally distrained, it was held that the money borrowed could not be recouped, as it was a distinct debt, and not connected with the subject of the action.(a) In Sampson *v.* Warner,(b) recoupment was not allowed where the defendant had no legal claim against the plaintiff in connection with the contract on which the note was given. The plaintiff had attempted to set aside the contract under which the note was given, but failed to do so. The defendant was not allowed to recoup or set off damages suffered by him in defending that action, for the costs were a full recompense unless the defendant had a cause of action for malicious prosecution, in which case he should have commenced a separate action, for "such damages did not arise directly out of the contract, or from a breach of it by the plaintiff." In a servant's action for wages the employer cannot recoup damages for an act outside of the servant's employment.(c) So if a defendant has repudiated the possession of goods under a contract, and claimed by a wrongful conversion, he is not entitled to the benefit of the contract to reduce the damages.(d)

* In a case of trespass *de bonis asportatis*,[1] the plaintiff had purchased goods of the defendant, and owed him £67. The plaintiff went off secretly; the defendant followed him and took off property, to about £50 or

[1] Gillard *v.* Brittan, 8 M. & W. 575, 578.

(a) Hubbard *v.* Rogers, 64 Ill. 434.
(b) 48 Vt. 247.
(c) Nashville & C. R.R. Co. *v.* Chumley, 6 Heisk. 325.
(d) Backenstoss *v.* Stahler, 33 Pa. 251.

£60, which the defendant had previously sold him. The judge who tried the cause told the jury that, in estimating the damages, they might take into consideration all the circumstances of the case, and, amongst others, the plaintiff's debts to defendant, which would be reduced, *pro tanto*, by the value of the goods taken away. The jury found for the defendant; and on motion for a new trial, the charge was held wrong. "It would lead," said Abinger, C. B., "to this consequence, that a party may set off a debt due in one case against damages in another." Alderson, B., said: "It is equivalent to allowing a set-off in trespass"; and the rule for a new trial was made absolute.** So in an action for assault and battery, the defendant's damages for an assault by the plaintiff upon him just previous to the assault upon which action was brought, cannot be recouped.([a]) It is held in Massachusetts that on an action for the purchase-money of land, the defendant cannot recoup damages for breach of a contract by the plaintiff to insure, made after the sale.([b]) So in Hubbard *v.* Rogers ([c]) it was held that a landlord, who was sued by a tenant for wrongfully distraining his goods, could not recoup damages for a failure to repay money borrowed at the time of the making of the lease, and which was to be repaid in monthly instalments together with the rent, the court saying, that to be a subject of recoupment, a claim must arise out of the cause of action involved in the plaintiff's suit. It results from the general rule that a claim arising either previously ([d]) or subsequently ([e]) to the contract sued on cannot be a subject for recoupment.

([a]) Barhyte *v.* Hughes, 33 Barb. 320.
([b]) Brighton F. C. S. Bank *v.* Sawyer, 132 Mass. 185.
([c]) 64 Ill. 434.
([d]) Hamilton *v.* Grangers' L. & H. Ins. Co., 65 Ga. 750.
([e]) Gilchrist *v.* Partridge, 73 Me. 214.

§ 1043. **Damages subsequent to commencement of suit.**— There can be no recoupment of damages sustained subsequent to the commencement of the suit.[1] In Bartlett *v.* Holmes ([a]) the plaintiff sued to recover the price of iron sold to the defendants. The plaintiffs had been ready to deliver the iron on the performance, by the defendants, of certain conditions, but after the commencement of the action refused to deliver up the iron. This refusal the defendants attempted to show in reduction of damages. Jervis, C. J., said:

"It seems to me that we should be carrying the doctrine respecting circuity of action very much further than any case has yet carried it, if we were to hold that the damages may be reduced by showing a breach of contract on the plaintiff's part subsequently to the commencement of the action. There are many cases where circumstances, existing before action brought, have been allowed to be given in evidence to mitigate or reduce the damages; but none, that I am aware of, where matters, arising after action brought, have been so received."

§ 1044. **Form of action.**—Generally speaking, the form either of the action brought by the plaintiff or of that by which the defendant's claim must be enforced is immaterial. Recoupment is generally allowed in actions of contract; but it may be allowed in an action of tort,([b]) and even if the defendant's claim is for a tort,([c]) if the case is otherwise a proper one for recoupment; but it must so seldom happen that damages for one tort can be recouped in an action for another, that it has been laid down generally that one tort cannot be recouped in an action for another tort.([d]) Recoupment has been re-

[1] Harger *v.* Edmonds, 4 Barb. 256.

([a]) 13 C. B. 630, 638.

([b]) Stow *v.* Yarwood, 14 Ill. 424; Turner *v.* Retter, 58 Ill. 264; Saltus *v.* Everett, 20 Wend. 267, 273.

([c]) Chandler *v.* Childs, 42 Mich. 128; Sinker *v.* Diggins, 76 Mich. 557.

([d]) Terre Haute & I. R.R. Co. *v.* Pierce, 95 Ind. 496.

fused in certain special forms of action, such as detinue,(a) and forcible entry and detainer,(b) but has been allowed in actions to enforce a mechanic's lien,(c) and in replevin.(d) There seems, however, to be no reason for any distinction growing out of the form of action.

In a case in Massachusetts,(e) where the plaintiff sued in tort for fraudulent representations of the defendant, concerning a horse which the plaintiff had taken from the defendant in exchange for another horse, the defendant was allowed to recoup *his* damage from the fraudulent representations as to the horse delivered by the plaintiff. The question was fully considered. The court said :

"For misrepresentation of the character alleged each party may generally sue in contract or in tort. If the plaintiff had declared in contract, alleging that the defendant agreed that his horse was sound as far as he knew, knowing him to be unsound, it cannot be doubted, in view of the authorities cited above, that the defendant might recoup his damages. The fact that the plaintiff sues in tort does not complicate the matter."

Reference was made to various early decisions in which recoupment in the old real actions and in tort was recognized.(f) The case of Odom *v.* Harrison (g) is opposed to this Massachusetts decision, but the case seems based on the repudiation of the whole doctrine of recoupment. In an action for killing a dog while engaged in driving the defendant's cattle out of the plaintiff's field,

(a) Whitworth *v.* Thomas, 83 Ala. 308.

(b) McSloy *v.* Ryan, 27 Mich. 110; Johnson *v.* Hoffman, 53 Mo. 504. *Contra*, Breese *v.* McCann, 52 Vt. 498.

(c) Korf *v.* Lull, 70 Ill. 420; Bush *v.* Jones, 2 Tenn. Ch. 190.

(d) Macky *v.* Dillinger, 73 Pa. 85.

(e) Carey *v.* Guillow, 105 Mass. 18.

(f) Coulter's Case, 5 Co. 30; Whitehall *v.* Squire, Carth. 103; Mountford *v.* Gibson, 4 East 441; and see Icely *v.* Grew, 6 Nev. & Mann. 467, 469, note *a*.

(g) 1 Jones L. 402.

the defendant was allowed to recoup the damages sustained by the cattle above what was necessary to drive them out.(a) In trover for stock, assessments rightfully paid on the stock can be recouped.(b) In trover for a note sent to the defendant to collect, the latter may recoup his services and expenses in collecting.(c)

§ 1045. **Notice.**—Recoupment cannot be allowed unless proper notice of the defense has been given to the plaintiff. Thus in an early case in the Supreme Court of New York [1] the court said: "The defendant neither pleaded nor gave notice of this defense; and it must have been a complete surprise upon the plaintiff, as he cannot be presumed to have come prepared to meet it at the trial." [2] The notice must be specific.(d)

§ 1046. **Recoupment must be pleaded.**—* As to the way in which the defense of recoupment is to be set up, it is now settled that evidence to support it, if total and going to the whole action, will be received under the general issue, but that where it is only partial it cannot be pleaded, and notice must be given with the plea. In New York the courts hold "notice to be an essential part of the rule." [3] (e)

[1] Runyon *v.* Nichols, 11 Johns. 547.

[2] In Hopping *v.* Quin, 12 Wend. 517, it was held, without any reference to the question of notice attached to the plea, that an attorney could not recover in an action of assumpsit for his fees, when the suit which he had been retained to bring had been so negligently managed that his services were worth nothing. But in The People *v.* Niagara C. P., 12 Wend. 246, the necessity of notice in case of a partial failure of consideration was insisted on.

[3] The Mayor of Albany *v.* Trow bridge, 5 Hill 71; affirmed in Error, 7 Hill 429; Batterman *v.* Pierce, 3 Hill

(a) Spray *v.* Ammerman, 66 Ill. 309.

(b) McCalla *v.* Clark, 55 Ga. 53.

(c) Turner *v.* Retter, 58 Ill. 264.

(d) Burgess *v.* Beaumont, 7 M. & G. 962; Roethke *v.* P. B. Brewing Co., 33 Mich. 340; Bolt *v.* Friederick, 56 Mich. 20.

(e) Stever *v.* Lamoure, Hill & D. Supp. 352; Stearns *v.* Marsh, 4 Denio 227.

This, too, appears decided in New Hampshire;[1] and in most of our sister States the general rule seems to be settling down as in New York, with, however, considerable fluctuation.([a]) **

§ 1047. **Allowed, though both demands are unliquidated.**— *The subject was considered in an action[2] brought on a promissory note given for wood, which had been destroyed by reason of the payee of the note having burned over a piece of fallow ground adjacent to the lot where the wood lay, and against the consequences of which, at the time of the giving of the notes, he had undertaken to guarantee the defendants. At the trial, the circuit judge excluded the evidence which was offered as a defense to the note. But on a motion for a new trial, this was held erroneous, and Bronson, J., said: "It is not a question of set-off, as the plaintiff's counsel seems to suppose, but of recoupment of damages. When the demands of both parties spring out of the same contract or transaction, the defendant may *recoup*, although the damages on both sides are unliquidated; but he can only *set off* when the demands of both parties are liquidated, or capable of being ascertained by calculation." It was further urged that the damages claimed by the defendant did not

171; Barber *v.* Rose, 5 Hill 76; Whitbeck *v.* Skinner, 7 Hill 53; Stearns *v.* Marsh, 4 Denio 227; McCullough *v.* Cox, 6 Barb. 386; Eldridge *v.* Mather, 2 N. Y. 157.

[1] Britton *v.* Turner, 6 N. H. 481.

[2] Batterman *v.* Pierce, 3 Hill 171. See this case commented on in Cram *v.* Dresser, 2 Sandf. 120.

([a]) In Massachusetts recoupment must be specially pleaded. Hodgkins *v.* Moulton, 100 Mass. 309; Wentworth *v.* Dows, 117 Mass. 14; Lamson & G. Mfg. Co. *v.* Russell, 112 Mass. 387; Jackman *v.* Doland, 116 Mass. 550. And such is the general rule. Estep *v.* Morton, 6 Ind. 489; Heaston *v.* Colgrove, 3 Ind. 265; Simonds *v.* Cross, 63 N. H. 123; The Wellsville *v.* Geisse, 3 Oh. St. 333. So in Arkansas, except when the general issue is pleaded, and notice given. McLure *v.* Hart, 19 Ark. 119. In Pennsylvania no notice is required. Deen *v.* Harrold, 37 Pa. 150; nor in Illinois: Murray *v.* Carlin, 67 Ill. 286; Cooke *v.* Preble, 80 Ill. 381.

spring out of the contract of sale, but arose under the collateral agreement of the plaintiff to indemnify against the fire. But while the court admitted "that there could be no recoupment by setting up the breach of an independent contract on the part of the plaintiff," still, here the bargain was held to be one and the same.[1] **

§ 1048. **Election between recoupment and cross-action.**— * Nor is the party entitled to recoup—as, for instance, the maker of a note given for the price of goods, who seeks redress for the non-delivery at the stipulated time—denied this relief because he has commenced a suit against the seller; but he will be obliged to elect between his own suit and the recoupment.[2] (a)

So in Alabama, defendant by electing to recoup the damages when sued for a breach of contract, thereby precludes himself from afterwards suing for damages.[3] ** So in Delaware it has been decided, after careful examination of the authorities, that in all cases of warranty, of actions for the price of work and labor, or breach of contracts to deliver goods of a certain quality, the defendant may recoup damages in the action for the price, or sue independently, in which case plaintiff's recovery of the price is no bar to the subsequent suit for the breach, unless the defendant in the prior suit availed himself of his counter-claim. (b)

[1] "In two cases," said the court: "Tuttle *v.* Tompkins, 2 Wend. 407, and Sickels *v.* Fort, 15 Wend. 559, this doctrine has been lost sight of. The truth is, that the doctrine, although founded on the plainest principles of justice, is not of very long standing; but the principle is now too firmly settled to be shaken by a few straggling cases, or the occasional dicta which seem to look in the opposite direction."

[2] Fabbricotti *v.* Launitz, 3 Sandf. 743.

[3] McLane *v.* Miller, 12 Ala. 643.

(a) McKinney *v.* Springer, 3 Ind. 59; Epperly *v.* Baily, 3 Ind. 72; Rankin *v.* Harper, 4 Ind. 585; Merriam *v.* Woodcock, 104 Mass. 326; Star Glass Co. *v.* Morey, 108 Mass. 570; Naylor *v.* Schenck, 3 E. D. S. 135.

(b) Tomlinson *v.* Quigley, 5 Houst. 168.

§ 1049. **No recovery by the defendant.**—Recoupment operates only to reduce the damages recoverable by the plaintiff. The defendant who recoups does not become himself a party plaintiff as he does in the statutory proceedings of set-off and counter-claim, and he can therefore recover nothing, though the claim recouped is greater in amount than the plaintiff's claim.([a])

§ 1050. **Recoupment in action on a note or bill.**—When an action is brought upon a note or bill, given in payment of an indebtedness, according to the prevailing view the case is the same as if no note or bill had been given, and the suit were upon the original indebtedness.([b]) This is in effect claiming a partial failure of consideration for the note,([c]) and should be allowed only upon such pleadings as are required in ordinary cases of partial failure of consideration. Thus in Arkansas, in an action on a note, a plea of partial failure of consideration

([a]) Brunson *v.* Martin, 17 Ark. 270; Lutburrow *v.* Henderson, 30 Ga. 482; Stow *v.* Yarwood, 14 Ill. 424; Babcock *v.* Trice, 18 Ill. 420 (*semble*); Daniels *v.* Wilber, 60 Ill. 526; Ward *v.* Fellers, 3 Mich. 281, 289; Hay *v.* Short, 49 Mo. 139, 142 (*semble*).

([b]) Timmons *v.* Dunn, 4 Oh. St. 680; Upton *v.* Julian, 7 Oh. St. 95; McAlpin *v.* Lee, 12 Conn. 129; Harrington *v.* Stratton, 22 Pick. 510; Merrill *v.* Taylor, 72 Tex. 293.

([c]) So, as early as 1791, it was held by Lord Kenyon, at Nisi Prius, that if there were no consideration for part of the sum contained in a bill of exchange, the jury might apportion the damages. Mr. Law, the plaintiff's counsel, said he would look into the cases, and take the opinion of the court if he found them favorable to him. He never moved for a new trial, and afterwards expressed himself satisfied with the decision. Barber *v.* Backhouse, Peake 61. See, also, Ledger *v.* Ewer, Peake 216; Wiffen *v.* Roberts, 1 Esp. 261. Where the plea is partial failure of consideration to a promissory note, in Vermont it is held that there can be no abatement of the damages, unless there has been fraud, and an offer to rescind, and the amount to be deducted can be fixed by computation. Burton *v.* Schermerhorn, 21 Vt. 289; Richardson *v.* Sanborn, 33 Vt. 75; Harrington *v.* Lee, 33 Vt. 249. *Cf.* Kelly *v.* Pember, 35 Vt. 183; Clough *v.* Patrick, 37 Vt. 421. In New Hampshire, in actions on notes, recoupment for partial failure of consideration is allowed where the amount is liquidated. Riddle *v.* Gage, 37 N. H. 519.

was alleged. The court held this bad as a plea in bar, but good as matter of recoupment.(a) In delivering the opinion, Mr. Justice Scott stated the doctrine of recoupment in the following terms:

"According to these doctrines, there can be no doubt but that in all that class of cases commonly called partial failure of consideration, whether involving bad faith or not; or where fraud has intervened, whether in the obtaining or in the performance of contracts; or there has been a breach of warranty, fraudulent or not; or of any other stipulation of the contract sued upon, entitling the defendant to a cross-action against the plaintiff, to recover damages for such failure, fraud, or breach: he may, if he elects to do so, instead of resorting to such cross-action, plead the matter by special sworn plea, under the provisions of our statute; or, if upon a verbal contract, plead the general issue, and give notice of the matter relied upon, and claim a reduction of the amount the plaintiff would otherwise recover, corresponding with the injury he has sustained."

Further on the judge said: "The amount of such damages the jury, of course, would have to ascertain from the proofs, precisely as if a cross-action, in form, had been brought to recover damages for this breach of the contract."

In the ensuing discussion, the cases in which action is brought upon the note and those in which it is brought upon the original indebtedness will be treated together, and no distinction made between them.

§ 1051. **Recoupment in action for an instalment.**—Where the contract upon which suit is brought is payable in instalments, a difficult question may be raised by an attempt to recoup damages. If the action is brought to recover the last instalment, the balance having been already paid, recoupment will be allowed as in the ordi-

(a) Desha *v.* Robinson, 17 Ark. 228, 246.

nary case.(a) In granting recoupment in such a case, the Supreme Court of Illinois said that if the suit were brought upon the first instalment an embarrassing question would arise.(b) But a case in the Supreme Court of Georgia would seem to involve a decision that damages can be recouped in an action to recover the first instalment. In that case half of the purchase-money for goods was payable on delivery and half in six months from that time. Nothing having been paid, action was brought at the end of six months. The defendant was allowed to recoup an amount equal to more than one instalment. A question arose as to the allowance of interest, and it was held that interest on the amount recovered should be allowed only from the time the last instalment was due.(c) If the defendant could not recoup until the last instalment was due, the first would have been payable on delivery of the goods (or so much of it, at least, as was equal to what was finally found to be due), and interest should have been awarded from that time.

§ 1052. **Fraud in sale of land.**—* In a case of fraud in the sale of land,[1] the general doctrine was thus laid down. The case was an action of debt on bond. The defendant offered to prove that it was given in part purchase for land which the plaintiff had fraudulently and falsely represented to be very different from what it was. Bronson, J., said that under the statute (2 R. S., p. 406, § 77) which declared, "that a seal shall only be presumptive evidence of a sufficient consideration, which

[1] Van Epps *v.* Harrison, 5 Hill 63. See, also, M'Cullough *v.* Cox, 6 Barb. 386.

(a) McAlester *v.* Landers, 70 Cal. 79.
(b) Hutt *v.* Bruckman, 55 Ill. 441.
(c) Van Winkle *v.* Wilkins, 81 Ga. 93.

may be rebutted in the same manner and to the same extent as if the instrument were not sealed," the defendant would be allowed to recoup damages in an action upon a sealed as well as on an unsealed instrument.** And it is settled that in an action to recover the purchase-money of land, the defendant may recoup his damages from the plaintiff's fraud in the sale.(a) This may be done even in an action to enforce the vendor's lien.(b)

§ 1053. **Breach of real covenants.**—Where[1] suit was brought on two notes given for the purchase-money of land conveyed with warranty, but the title to which had proved bad, the court held that the consideration had totally failed, and that this was a good defense to the suit. In Davis *v.* Bean (c) the action was on a promissory note given for the price of land. The conveyance of the land contained a covenant against incumbrances. There were, however, certain taxes upon the land which the defendant paid off and sought to recoup in this action. Welles, J., held that as the defendant's claim grew out of the same transaction as the suit on the note, and affected the consideration, he could recoup. And the general rule is established that in an action for the purchase-money of land a breach of a covenant in the deed can be shown in recoupment.(d)

[1] Frisbee *v.* Hoffnagle, 11 Johns. 50. But in Whitney *v.* Lewis, 21 Wend. 131, and Batterman *v.* Pierce, 3 Hill 171, it has been said that Frisbee *v.* Hoffnagle is overruled. See, also, Lamerson *v.* Marvin, 8 Barb. 9.

(a) Brown *v.* Crowley, 39 Ga. 376; White *v.* Sutherland, 64 Ill. 181; Graham *v.* Wilson, 6 Kas. 489; Hammatt *v.* Emerson, 27 Me. 308; Lamerson *v.* Marvin, 8 Barb. 9, 18 (*semble*); Mulvey *v.* King, 39 Oh. St. 491; Adams *v.* Wylie, 1 N. & McC. 78.

(b) Haynes *v.* Harper, 25 Ark. 541.

(c) 114 Mass. 358.

(d) James *v.* Elliott, 44 Ga. 237; Schuchmann *v.* Knoebel, 27 Ill, 175; Christy *v.* Ogle, 33 Ill. 295; McDowell *v.* Milroy, 69 Ill. 498; Tone *v.* Wil-

This is not universally followed. In Bowley *v.* Holway,[a] the vendee sold the property with covenants of seizin and warranty, but in fact had only a life estate. There had been no eviction. In an action for the price, partial failure of consideration was pleaded. Morton, J., said that in suits to recover the price of chattels this plea would be good to reduce the damages, but that it was otherwise in cases of real estate.[b]

"In Rice *v.* Goddard [c] there was a total failure of the title, and the grantee was ousted from the possession of the land, and it was held that this was a good defense to a suit upon a note given for the land, because, there being an entire want of consideration, it was *nudum pactum*. But the case does not intimate that a partial failure of title, or other breach of covenant, could be shown in defense by way of recoupment. In the case at bar the plaintiff was seized of a freehold in the premises, which by his deed passed to the defendant. There was not, therefore, a want of consideration which made the promise to pay the agreed price *nudum pactum*."

The doctrine of this case is inconsistent with Davis *v.* Bean,[d] in which, as stated above, under plea of failure

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son, 81 Ill. 529; Baker *v.* Railsback, 4 Ind. 533; Reynolds *v.* Cox, 11 Ind. 262; Burk *v.* Clements, 16 Ind. 132; Stilwell *v.* Chappell, 30 Ind. 72; Scheible *v.* Slagle, 89 Ind. 323; Brandt *v.* Foster, 5 Ia. 287; Scantlin *v.* Allison, 12 Kas. 85; Rand *v.* Webber, 64 Me. 191; Myers *v.* Estell, 47 Miss. 4; Estell *v.* Myers, 54 Miss. 174; House *v.* Marshall, 18 Mo. 368; Grand Lodge of Masons *v.* Knox, 20 Mo. 433; Hall *v.* Clark, 21 Mo. 415; McGinnis *v.* Noble, 7 W. & S. 454; Sumter *v.* Welsh, 2 Bay 558; Tunno *v.* Fludd, 1 McC. 121; Merrill *v.* Taylor, 72 Tex. 293. In some old cases, however, it has been held that there could be no recoupment, and that full recovery could be had on the note unless the consideration entirely failed through the failure of the defendant to secure possession. Moggridge *v.* Jones, 3 Camp. 38; 14 East 486; Greenleaf *v.* Cook, 2 Wheat. 13; Thompson *v.* Mansfield, 43 Me. 490; Freligh *v.* Platt, 5 Cow. 494.

(a) 124 Mass. 395, 397.

(b) 2 Kent. Com., 12th ed. 473.

(c) 14 Pick. 293.

(d) 114 Mass. 358.

of consideration, the defendant was allowed to recoup for breach of a covenant against incumbrances, he having paid off the incumbrance. In Wheat *v.* Dotson (a) and Key *v.* Henson,(b) it was said that damages for a partial failure of title to real estate could not be recouped in an action for the price, on the ground that recoupment was of equitable origin, adopted to avoid circuity of action, and afterwards introduced into courts of law; that its scope was limited to those cases where the processes of the law courts were fitted to settle all questions arising out of the same subject-matter. "Courts of equity, by means of their exclusive and peculiar jurisdiction over the title to real estate, to compel its transfer to the party to whom, upon principles of equity, it may rightfully belong, after the adjustment and removal of incumbrances upon it, are alone competent, by their constitution, to administer complete justice between the parties and terminate all further litigation." In Key *v.* Henson, from which this language is taken, the facts were peculiar, and recoupment by the defendant would not have terminated all litigation on the subject; but in the majority of cases an action or recoupment on the covenants of title would be the only remedy to the purchaser for failure of title, and on these but one action could be maintained. In Wheat *v.* Dotson the decision was also placed on the ground "that the vendee in general sustains no injury by a partial defect of title, so long as he retains possession." On this ground the decision would be correct, as until then there is nothing to recoup.

§ 1054. **Profits of land occupied.**—If the vendee sue the vendor on a title bond after eviction by paramount title,

(a) 12 Ark. 699.
(b) 17 Ark. 254, 261.

the vendor cannot recoup for rents and profits received by the vendee.(a) Where there has been no eviction, but the sale has been rescinded, in an action to recover money paid for the land, the vendor may recoup the rents and profits.(b) So in an action for the price of land, the vendee may recoup damages from the vendor keeping the land beyond the agreed time.(c) Where the plaintiff having been by fraud induced to take land in payment of a debt, rescinded the contract and sued on the debt, the defendant was allowed to recoup the rents and profits received.(d)

§ 1055. **Trespass by grantor.**—Where the grantor, after the conveyance, came upon the land and removed fixtures(e) or crops,(f) it was held in Missouri that the value of the property thus removed might be recouped in an action for the purchase-money. But this is an improper application of the doctrine. Such removal would ordinarily be treated as an independent tort.

§ 1056. **Fraud in effecting a lease of land.**—* In the Supreme Court of New York, where suit was brought for rent, it was shown the defendant was induced to sign the lease through the fraudulent representations of the plaintiff, that the lot comprehended a certain parcel of land, which proved to belong to the corporation of the city of New York. It was held, that he had a right to recoup the damages resulting from the fraud,(g) and that they were, at least, the rent which he had to pay for the corporation property.[1] **

[1] Allaire *v.* Whitney, 1 Hill 484; and see, also, Whitney *v.* Allaire, 4 Denio 554.

(a) Greene *v.* Allen, 32 Ala. 215. (b) Collins *v.* Thayer, 74 Ill. 138.
(c) Patterson *v.* Hulings, 10 Pa. 506.
(d) Warren *v.* Tyler, 81 Ill. 15.
(e) Grand Lodge *v.* Knox, 20 Mo. 433.
(f) Gordon *v.* Bruner, 49 Mo. 570; *contra*, Slayback *v.* Jones, 9 Ind. 470.
(g) *Acc.* Burroughs *v.* Clancey, 53 Ill. 30.

§ 1057. **Breach of covenants in lease.**—* In an action for use and occupation, if the defendant be entitled to damages on account of the tenement not being repaired, they may be set up by way of reducing or extinguishing the rent.[1] (a) And so, too, in the action of replevin after distress for rent.(b) ** And it is now generally held that the breach of a covenant in a lease may be proved in recoupment in an action for the rent.(c) Thus a breach of a covenant for quiet enjoyment is a proper subject of recoupment in an action for rent.(d) In Mayor of New York *v.* Mabie,(e) Denio, J., said:

"Before the doctrine of recoupment had been as firmly established as it now is, it was repeatedly decided that the lessee could not, in an action for rent, set up the breach by the plaintiff of a covenant in the same lease, though such covenant concerned the subject for which the rent was agreed to be paid. The principle of these cases was afterwards repeatedly disapproved of in the same court in which they were decided, and it cannot be denied consistently with the doctrine now well established, but that in an action for a breach of contract the defendant may show that the plaintiff has not performed the same contract on his part, and may recoup his damages for such breach in the same action, whether they are liquidated or not, or may, at his election, bring a separate action."

Damages for not boarding the defendant in accordance with the terms of a lease may be recouped.(f) In Crane

[1] Westlake *v.* Degraw, 25 Wend. 669.

(a) Martin *v.* Hill, 42 Ala. 275; Guthman *v.* Castleberry, 49 Ga. 272; Fowler *v.* Payne, 49 Miss. 32.

(b) Lynch *v.* Baldwin, 69 Ill. 210; Bloodworth *v.* Stevens, 51 Miss. 475.

(c) McAlester *v.* Landers, 70 Cal. 79; Wade *v.* Halligan, 16 Ill. 507; Lunn *v.* Gage, 37 Ill. 19; Pepper *v.* Rowley, 73 Ill. 262; Hoopes *v.* Meyer, 1 Nev. 433; Whitney *v.* Meyers, 1 Duer 266; Fairman *v.* Fluck, 5 Watts 516; Breese *v.* McCann, 52 Vt. 498.

(d) Holbrook *v.* Young, 108 Mass. 83.

(e) 13 N. Y. 151, 153.

(f) Shallies *v.* Wilcox, 2 Hun 419.

v. Hardman ([a]) it was held that in an action for rent the lessee might recoup damages for breach of a covenant to supply steam-power, Woodruff, J., saying that the cross-claim grew out of the lease, and the covenant was part of the consideration for the rent. Where a landlord distrained for rent, the tenant was allowed to recoup against his claim, damages for breach of a covenant to supply lumber for fences and to replaster the house.([b]) The action was replevin by the tenant, and he set up the breach of covenant in his reply. The court said that it was allowable, provided the plaintiff's damages equalled the amount distrained for. So where the landlord distrained, the tenant was allowed to recoup damages sustained by reason of the landlord's putting a water-pipe through one of the rooms, the court saying that damages "growing out of a breach of the terms of the lease by the landlord" might be recouped.([c])

§ 1058. **Tort of the landlord.**—Mere tortious acts of the landlord, wholly independent of the covenants of the respective parties, cannot be set up in recoupment.[1] ([d]) So a tenant cannot recoup for damage done to his crops by the trespass of his landlord's cattle.([e]) But where the landlord, after the lease was given, found the carcass of a dog in a well on the land, but afterwards upon being questioned by the tenant represented the water fit for use, damages resulting from use of the water may be recouped in an action for the rent.([f]) Here the recoupment is not

[1] Cram *v.* Dresser, 2 Sandf. 120.

([a]) 4 E. D. Smith 339.
([b]) Lindley *v.* Miller, 67 Ill. 244.
([c]) Lynch *v.* Baldwin, 69 Ill. 210.
([d]) Bartlett *v.* Farrington, 120 Mass. 284; Edgerton *v.* Page, 5 Abb. Pr. 1; Drake *v.* Cockroft, 10 How. Pr. 377.
([e]) Hulme *v.* Brown, 3 Heisk. 679.
([f]) Maywood *v.* Logan, 78 Mich. 135.

for an independent tort, but for a misrepresentation. But the point is at least doubtful. The representation was made after the lease containing the covenant for rent was executed.

§ 1059. **Sale of chattels—Non-delivery of part.**—A purchaser sued for the price of goods, where part only was delivered, may recoup damages for non-delivery of the remainder.[a] But in Deming *v.* Kemp,[b] where goods were furnished under a contract to supply a given amount, but they were delivered in different lots at different times, and each lot was settled for as delivered, it was held that each delivery was to be considered as a separate contract, and that in an action for the price of the last lot, damages could not be recouped for the inferior quality of the first lot.

§ 1060. **Defect in goods delivered.**—Damages sustained whether by breach of warranty [c] or defect,[d] or by false

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[a] Harralson *v.* Stein, 50 Ala. 347; Cole *v.* Swanston, 1 Cal. 51; Cherry *v.* Sutton, 30 Ga. 875; Richards *v.* Shaw, 67 Ill. 222; Rogers *v.* Humphrey, 39 Me. 382; Platt *v.* Brand, 26 Mich. 173; Tipton *v.* Feitner, 20 N. Y. 423; Upton *v.* Julian, 7 Oh. St. 95; Holzworth *v.* Koch, 26 Oh. St. 33; McHose *v.* Fulmer, 73 Pa. 365; McDonald *v.* Unaka T. Co., 88 Tenn. 38.

[b] 4 Sandf. 147.

[c] Dushane *v.* Benedict, 120 U. S. 630; Williams *v.* Miller, 21 Ark. 469; Plant *v.* Condit, 22 Ark. 454; Polhemus *v.* Heiman, 45 Cal. 573; Babcock *v.* Trice, 18 Ill. 420; Mears *v.* Nichols, 41 Ill. 207; Hutt *v.* Bruckman, 55 Ill. 441; Murray *v.* Carlin, 67 Ill. 286; Bretz *v.* Fawcett, 29 Ill. App. 319; Miller *v.* Gaither, 3 Bush 152; Beall *v.* Pearre, 12 Md. 550; M'Hardy *v.* Wadsworth, 8 Mich. 349; Marcus *v.* Thornton, 44 N. Y. Super. Ct. 411; Walling *v.* Schwartzkopf, 44 N. Y. Super. Ct. 576; Dayton *v.* Hooglund, 39 Oh. St. 671; Deen *v.* Herrold, 37 Pa. 150; Parker *v.* Pringle, 2 Strobh. 242; Walker *v.* Hoisington, 43 Vt. 608; Getty *v.* Rountree, 2 Chand. 28; Fisk *v.* Tank, 12 Wis. 276.

[d] Smith *v.* Mayer, 3 Col. 207; Van Winkle *v.* Wilkins, 81 Ga. 93; Westcott *v.* Nims, 4 Cush. 215; Hoover *v.* Peters, 18 Mich. 51; Sinker *v.* Diggins, 76 Mich. 557; Spalding *v.* Vandercook, 2 Wend. 431; Stewart *v.* Bock, 3 Abb. Pr. 118; Ketchum *v.* Wells, 19 Wis. 25.

representations or fraud in the sale of goods,[a] may be recouped in an action for the price.[b] In Bradley *v.* Rea [c] the plaintiff sued for the price of some sheep sold with a warranty; Hoar, J., said, that if the defendant had sued for a breach of warranty, he could have recovered damages suffered through communication of disease to other sheep belonging to the purchaser, and that the same damages could be recouped. "The right to recoup in damages should not be confined to the diminished value of those which are proved to have disease at the time of the sale."

§ 1061. **Breach of a term of sale.**—Damages for breach of covenant to keep a machine in repair, may be recouped in an action for the price.[d] So on a note given for the purchase of wagons the defendant may recoup by showing a breach of the plaintiff's contemporary agreement that he should have the exclusive agency for the wagons.[e] In an action upon a note given for the purchase of cord-wood, damages for breach of the plaintiff's contemporary agreement that the wood should be converted into char-

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[a] Withers *v.* Greene, 9 How. 213; Caldwell *v.* Sawyer, 30 Ala. 283; Jemison *v.* Woodruff, 34 Ala. 143 (*semble*); Rotan *v.* Nichols, 22 Ark. 244; Flint *v.* Lyon, 4 Cal. 17; Love *v.* Oldham, 22 Ind. 51; Harman *v.* Sanderson, 6 Sm. & M. 41; Sill *v.* Rood, 15 Johns. 230; Hogg *v.* Cardwell, 4 Sneed 151.

[b] Parson *v.* Sexton, 4 C. B. 899; Miller *v.* Smith, 1 Mason 437; Atkins *v.* Cobb, 56 Ga. 86; Doane *v.* Dunham, 65 Ill. 512; Barrow *v.* Window, 71 Ill. 214; Cooke *v.* Preble, 80 Ill. 381; Harper *v.* Dotson, 43 Ia. 232; Culver *v.* Blake, 6 B. Mon. 528; Bowker *v.* Hoyt, 18 Pick. 555; Perley *v.* Balch, 23 Pick. 283; Goodwin *v.* Morse, 9 Met. 278; Bradley *v.* Rea, 14 All. 20; Star Glass Co. *v.* Morey, 108 Mass. 570; Simmons *v.* Cutreer, 12 Sm. & M. 584; Beecker *v.* Vrooman, 13 Johns. 302; Spalding *v.* Vandercook, 2 Wend. 431; Seigworth *v.* Leffel, 76 Pa. 476; Bonnell *v.* Jacobs, 36 Wis. 59; Morehouse *v.* Comstock, 42 Wis. 626.

[c] 14 All. 20, 24.

[d] Prairie Farmer Co. *v.* Taylor, 69 Ill. 440.

[e] André *v.* Morrow, 65 Miss. 315.

coal upon his land may be recouped.(a) Where the plaintiff sold a judgment to the defendant, and afterwards collected part of it, the defendant may recoup the amount thus collected in an action for the price.(b)

§ 1062. **From sale of good-will of business.**—In an action on a note given for the good-will of a business, the defendant may recoup the damages he has sustained through a resumption of business by the plaintiff.(c) And conversely, in an action for the resumption of business, the defendant may recoup the unpaid instalment of the purchase-money.(d)

§ 1063. **Contracts for the hire of chattels.**—* When a horse hired to perform a certain journey becomes disabled while on his return, without fault on the part of the hirer, so that he is unable to travel, and the hirer is thereby compelled to procure other means of returning home, and to incur expenses in consequence thereof, those expenses may be recouped against the bailor in an action for the hire of the horse, even to the full extent of the price agreed for his hire.[1] ** A defendant sued for the rent of a fence, may recoup damages to his crops by cattle breaking in through a defect in the fence.(e) In an action on a charter party the defendant may recoup damages for false representations as to the capacity of the vessel.(f) In an action for the hire of slaves which ran away during the term and were harbored by the

[1] Harrington *v.* Snyder, 3 Barb. 380.

(a) Harman *v.* Bannon, 71 Md. 424.
(b) Harper *v.* Columbus Factory, 35 Ala. 127.
(c) Mell *v.* Mooney, 30 Ga. 413; Lufburrow *v.* Henderson, 30 Ga. 482; Herbert *v.* Ford, 29 Me. 546.
(d) Warfield *v.* Booth, 33 Md. 63.
(e) Scott *v.* Kenton, 81 Ill. 96.
(f) Johnson *v.* Miln, 14 Wend. 195.

lessor, the defendant may recoup damages for the harboring.(a)

§ 1064. **Contracts of service—Departure without notice.**—In an action for wages, the defendant can recoup damages for the loss suffered by the defendant's leaving him without giving such notice as was required by the agreement.(b) So if an overseer employed at a stipulated price per annum is sick a part of the time, and thus unfitted for active service, the employer may recoup the damages sustained by the imperfect performance of the contract.[1]

§ 1065. **Destruction of master's property.**—In an action brought upon promissory notes, of which the consideration was work and labor done by the plaintiff for the defendants, the defense was that while the plaintiff was in the employ of the defendants, as their servant, they were possessed of drawings, plans, models, and patterns of steam engines, etc., having names, numbers, and marks inscribed on them, so as to identify them ; and that the plaintiff, contrary to his duty as such servant, destroyed the drawings and plans, and obliterated the names, numbers, and marks of the plans, models, and patterns. It was held that the defendants might give evidence of such wrongful acts of the plaintiff, for the purpose of reducing the amount of the recovery. As the damages to be allowed in such a case, by way of recoupment, are such only as arise from breach of the plaintiff's contract, nothing could be allowed on account of the *malice* with which

[1] Jones *v.* Deyer, 16 Ala. 221 ; Hunter *v.* Waldron, 7 Ala. 753. See, also, McLane *v.* Miller, 12 Ala. 643.

(a) Berry *v.* Diamond, 19 Ark. 262.

(b) Satchwell *v.* Williams, 40 Conn. 371 ; Byerlee *v.* Mendel, 39 Ia. 382 ; Cota *v.* Mishow, 62 Me. 124 ; Hunt *v.* Otis Co., 4 Met. 464.

the wrongful acts were done.(a) In Brunson *v.* Martin (b) an employer was allowed to recoup against an overseer's action for wages, damages for killing a slave in the course of his employment. The decision was put on the ground of misbehavior in his duty. Where the plaintiff broke an instrument belonging to the defendant while in his employ, the value of it may be recouped in an action for wages.(c) So where the plaintiff carried off the defendant's tools, the value of the tools may be recouped.(d)

§ 1066. **Misbehavior in performance of duty.**—Where the employer suffered loss through the plaintiff's negligent performance of his duty, the amount of the loss may be recouped in an action for wages.(e) * So, in an action[1] brought by a factor to recover against his principal, the plaintiff's negligence in selling the defendant's goods, being set up by way of diminution of damages, the previous cases were reviewed, and the court said: "The question for a time may have ranked in the class of legal uncertainties; but it appears to us at present to be settled on reasonable and satisfactory principles." ** So where a warehouseman had advanced on cotton deposited with him, in an action brought for these advances, it was held competent for the owner of the cotton to recoup

[1] Dodge *v.* Tileston, 12 Pick. 328, 334.

(a) Allaire Works *v.* Guion, 10 Barb. 55.

(b) 17 Ark. 270.

(c) Wilder *v.* Stanley, 49 Vt. 105.

(d) Brigham *v.* Hawley, 17 Ill. 38.

(e) Robertson *v.* Davenport, 27 Ala. 574; Brunson *v.* Martin, 17 Ark. 270; Stoddard *v.* Treadwell, 26 Cal. 294; Lee *v.* Clements, 48 Ga. 128; Garfield *v.* Huls, 54 Ill. 427; Gilson *v.* Collins, 66 Ill. 136; Waterman *v.* Clark, 76 Ill. 428; Piper *v.* Manifee, 12 B. Mon. 465; Elliot *v.* Heath, 14 N. H. 131; McCracken *v.* Hair, 2 Speer 256; Goslin *v.* Hodson, 24 Vt. 140; Phelps *v.* Paris, 39 Vt. 511; Irving *v.* Morrison, 27 Up. Can. C. P. 242. *Contra*, Crowninshield *v.* Robinson, 1 Mason 93.

the damages sustained by the destruction of the cotton through the plaintiff's negligence.[1] In an action of assumpsit, brought by the master of a sloop for his wages, it was held competent for the owners to recoup the damages sustained by them in consequence of the plaintiff's negligence, in laying the sloop in such a way that she was run into and sunk.[2] So in Haysler *v.* Owen ([a]) the defendant was allowed to set up, in recoupment, a claim for injury by the plaintiff's negligent construction of a roof to his stable, the note being for the plaintiff's services in the construction. The plaintiff was allowed to recover for injury to his hay, for injury to a wall of the stable, and injury suffered by the enforced removal of his stock to another stable. In Campbell *v.* Somerville ([b]) the plaintiff had agreed to dig trenches for water pipes, and to keep them guarded at night. He failed to do so, and, in an action for the price, the defendant was allowed to recoup a judgment recovered by a third party, who had fallen into the trench and been injured. Colt, J., said : "The damages which the defendant seeks to set off arose from the non-performance by the plaintiff of the same contract on which he relies to maintain his action, and their allowance by way of defense to the contract declared on will operate to prevent circuity of action." So where an agent, to embarrass his principal, executed a contract in his principal's name, after he knew his authority to do so had been revoked, the damages may be recouped in an action by the agent for compensation.([c]) Where the servant, who lived in his employer's family, seduced his

[1] Hatchett *v.* Gibson, 13 Ala. 587. [2] Still *v.* Hall, 20 Wend. 51.

([a]) 61 Mo. 270.
([b]) 114 Mass. 334, 336.
([c]) McEwen *v.* Kerfoot, 37 Ill. 530.

employer's daughter, the damages recoverable by the father were recouped in an action for the servant's wages.(a) This is an extreme case.

§ 1067. **Contracts of construction.**—In an action upon a contract for construction, the defendant may recoup damages for poor workmanship and the use of poor materials;(b) and so also damages for not finishing the building in the agreed time may be recouped.(c) So where the plaintiff contracted to construct and keep in repair a bridge, but the bridge having been destroyed he failed to repair it, damages for failure to repair may be recouped in an action for the price.(d) Where the defendant, who repaired a machine for the plaintiff, kept some of the parts of it, in an action for the conversion of those parts he may recoup the price of the repairs.(e)

* So in an action of assumpsit on a promissory note, the defendant pleaded the general issue, with notice that the consideration of the note was the making of a quantity of provision barrels, under an agreement to manufacture them according to the inspection law, relative to beef and pork, and that a portion of the barrels were manufactured in an unskilful manner, whereby damage had accrued.

(a) Bixby *v.* Parsons, 49 Conn. 483.

(b) Dermott *v.* Jones, 2 Wall. 1; Robinson *v.* Mace, 16 Ark. 97; Shaefer *v.* Gildea, 3 Col. 15; Higgins *v.* Lee, 16 Ill. 495; Queen *v.* Doolan, 55 Ill. 526; Cooke *v.* Preble, 80 Ill. 381; Howell *v.* Medler, 41 Mich. 641; Haysler *v.* Owen, 61 Mo. 270; Ives *v.* Van Epps, 22 Wend. 155; Bloodgood *v.* Ingoldsby, 1 Hilt. 388; Gibson *v.* Carlin, 13 Lea 440; Allen *v.* Hooker, 25 Vt. 137; Wilson *v.* Greensboro, 54 Vt. 533. So where the action is to enforce a mechanic's lien. Bush *v.* Jones, 2 Tenn. Ch. 190.

(c) Front St. M. & O. R.R. Co. *v.* Butler, 50 Cal. 574; Korf *v.* Lull, 70 Ill. 420; Cooke *v.* Preble, 80 Ill. 381; Abbott *v.* Gatch, 13 Md. 314; Rockwell *v.* Daniels, 4 Wis. 432.

(d) Jefferson Co. *v.* Arrghi, 51 Miss. 667.

(e) Stow *v.* Yarwood, 14 Ill. 424.

The circuit judge excluded the evidence, and a verdict was given for the plaintiff for the amount claimed; but the Supreme Court of New York held the exclusion improper, and a new trial was ordered.[1] **

§ 1068. **Contracts of carriage.**—In England the rule is, that the consignee, who has received the goods, must pay the freight without deduction and resort to his cross-action for the damage.[2] In Meyer *v.* Dresser ([a]) it was held that neither a usage prevailing all over the world, giving the consignee the right to deduct from the freight the value of the missing goods, nor the law of the country of the consignee's domicile giving him such right (which being a matter of set-off not amounting to an extinguishment of the claim is, therefore, governed by the *lex fori*), applies to an action brought in England for the freight. But the inclination of judicial opinion in this country is to allow the injury done by the negligence of the carrier to be set off as an answer *pro tanto* to his claim for compensation.([b]) So, also, the consignee of property, a part of which is not delivered, may recoup the damage so sustained in an action against him for the freight.[3] So in Relyea *v.* New Haven Rolling Mill Co.([c]) the U. S. Circuit Court allowed the consignees of cargo to recoup against a master's claim for freight, damages arising from the failure of the cargo to correspond to the bill of lading, the consignees having advanced money on the faith of the bill of lading. In Elwell *v.* Skiddy ([d]) it was held that

[1] Spalding *v.* Vandercook, 2 Wend. 431.
[2] Davidson *v.* Gwynne, 12 East 381; Sheels *v.* Davies, 4 Camp. 119; and s. c. 6 Taunt. 65. And see Abbott on Shipping, part IV, ch. ix, p. 428.
[3] Hinsdell *v.* Weed, 5 Denio 172.

([a]) 16 C. B. (N. S.) 646.

([b]) Edwards *v.* Todd, 2 Ill. 462; Boggs *v.* Martin, 13 B. Mon. 239; Ward *v.* Fellers, 3 Mich. 281; Elwell *v.* Skiddy, 77 N. Y. 282; Leech *v.* Baldwin, 5 Watts 446; Humphreys *v.* Reed, 6 Whart. 435.

([c]) 42 Conn. 579.

([d]) 77 N. Y. 282.

in an action on a charter party, the shipper might recoup damages for seizure of the cargo by reason of the master's violation of the revenue laws.

§ 1069. **Pledges—Misapplication of the term recoupment.** —Where a pledgee converts the pledged property he may reduce the damages, in an action for the conversion, by the amount of his debt.(a) This is not recoupment, properly speaking; he has an interest in the property to the extent of the debt, and as against him the pledgor to that extent is not entitled to compensation. So a mortgagee who has converted the mortgaged property may recoup its value; (b) and a landlord wrongfully converting a crop may reduce the amount of recovery by the amount of his lien on the crop for rent.(c) But in Maine the converse case has been differently adjudged. Where the pledgee converted the pledged property, but not by a sale of it, it was held that the pledgor could not recoup damages for the conversion in an action on the note, because the pledge was a matter collateral to the note it was given to secure.(d) It would seem, however, that the case should have been otherwise decided, though, as we have just said, recoupment is not a proper term to apply. In Macky *v.* Dillinger (e) the defendant was allowed, in an action on a replevin bond given by him, to recoup the amount of the claim of a third party against the plaintiff, which was secured by a lien on the goods. It appeared, in that case, that the plaintiff had sent whiskey to one M., who wrongfully pledged it with the defendant for money he borrowed.

(a) Rosenzweig *v.* Frazer, 82 Ind. 342; Work *v.* Bennett, 70 Pa. 484. See § 80.

(b) Street *v.* Sinclair, 71 Ala. 110. See § 82.

(c) Jones *v.* Horn, 51 Ark. 19.

(d) Fletcher *v.* Harmon, 78 Me. 465; *acc.* Taggard *v.* Curtenius, 15 Wend. 155. But *contra*, Willoughby *v.* Comstock, 3 Hill 389 (*semble*).

(e) 73 Pa. 85.

The defendant was allowed to recoup the sum due by the plaintiff to M. *for advances*, with interest from the time of demand. The court said that there was no set-off in replevin, but that this was a proper subject of recoupment.

§ 1070. **Miscellaneous contracts.**—In a suit to foreclose a mortgage made to a railroad company, which had passed into the hands of an assignee, the mortgagee was allowed to show that the note and mortgage were given for stock, and that the company had guaranteed that the dividend on the stock would be sufficient to pay interest on the note.[a] In an action by a factor to recover over-advances on cotton, the defendant may recoup damages from breach of the factor's agreement to keep the cotton for a year.[b] A builder may recoup what is due him under the contract, in an action for his breach in allowing liens to attach to the building.[c] In Vermont, in Keyes *v.* Western Vt. S. Co.,[d] for breach of a stipulation contained in a lease to supply a derrick, to put pumps in order, and repair a drain, the defendant offered in recoupment evidence to show that the plaintiff worked the quarry unskilfully, so as to lessen its value. Poland, C. J., said:

"The English courts formerly held that in actions to recover for services performed, or for goods sold, where there was a specific contract as to the price, the defendant could not reduce the plaintiff's recovery below the stipulated price, by proving that the service was unskilfully or negligently performed, or that the goods sold were not of the quality represented by the sellers, and were of less value than the contract price. . . . . But the law has long been settled differently, both in England and in this country, and in all such cases the defendant is now al-

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[a] Haskell *v.* Brown, 65 Ill. 29.
[b] Grimes *v.* Reese, 30 Ga. 330.
[c] Wagner *v.* Dette, 2 Mo. App. 254.
[d] 34 Vt. 81, 83.

lowed to set up such matters in reduction of the plaintiff's damages."

After stating that the same rule applies where there has been a warranty, the Chief-Justice said:

"The defendant now claims that this doctrine of allowing a defendant to show, in reduction of the plaintiff's claim, damages occasioned by the plaintiff's failure to perform his contract, has been extended far enough to enable a defendant to set up the violation of distinct and independent stipulations by the plaintiff in a contract, in answer to damages claimed by the plaintiff for the non-performance by the defendant of the stipulations of such contract on his part, that, however independent and distinct the several stipulations or covenants of the parties may be, if they are contained in the same instrument, the defendant may reduce the plaintiff's recovery by showing the damages he has himself sustained by the non-performance on the part of the plaintiff, and this under the general issue. We do not think the doctrine has ever been carried to that extent in this State, and we doubt if it is yet settled to that extreme in New York, where the courts have gone beyond all others in favor of what is there termed the recoupment of damages."

It would be difficult to say in what cases stipulations in a contract could be considered independent of each other. The stipulations on one side are the consideration for those on the other, and while considered merely as agreements to do certain acts the former may be unconnected with the latter; considered in their legal relation, they are closely connected. In the case cited, the agreement to furnish a derrick was the consideration for the agreement to work the quarry in a skilful manner, and as closely connected with it as if the former agreement had been one to pay a sum of money. In an action for the price agreed upon for printing ballots, it appeared that one in every twenty-four of the ballots delivered under the contract was defective. The ballots had been folded together before delivery. It was held

that the expense of opening the bundles and taking out the defective ballots might be recouped.(a)

§ 1071. **Exchange of property.**—Where property was exchanged, in an action for breach of warranty or fraud by the defendant with regard to the property given by him, the latter may recoup damages from breach of warranty or fraud by the plaintiff with regard to the property given by the latter.(b)

§ 1072. **Recoupment prevents recovery for same cause.**—If in a prior action by the present defendant the plaintiff claimed and was allowed recoupment on account of the act for which he now claims damages, the recoupment is a bar to the present action.(c) * In New York the question seems first to have been agitated in a case[1] where the plaintiff below, Scriven, sued the defendant Jones in a justice's court, in an action of deceit and warranty on the sale of the art of manufacturing potashes in a new and improved mode. The defendant offered in evidence a former judgment[2] rendered in favor of Jones, in a suit by him against Scriven, on a note given by Scriven for the art in question, after evidence on the point as to the value of the patent. On this proof of the judgment in the former suit, the defendant below moved for a nonsuit, which was overruled, and a verdict found for the plaintiff. This judgment being brought up by *certiorari* to the Supreme Court, was reversed on the ground that the very question between the parties, namely, the value

[1] Jones *v.* Scriven, 8 Johns. 453.

[2] The text uses the word "trial," but the marginal note has the words "trial and judgment," and so it should evidently be.

(a) Macgowan *v.* Whiting, 9 Daly 86.

(b) Eckles *v.* Carter, 26 Ala. 563; Chandler *v.* Childs, 42 Mich. 128.

(c) Burnett *v.* Smith, 4 Gray 50; O'Connor *v.* Varney, 10 Gray 231; Timmons *v.* Dunn, 4 Oh. St. 680.

of the patent, was decided in the first suit; and the court by implication held, that, in the first suit on the note, the evidence to show the want of consideration was admissible.**

The plaintiff is barred, however, only as to items of damage which might have been allowed him in recoupment.(a) In Rigge *v.* Burbidge (b) the plaintiff sued for negligence in putting up a range. The defendant alleged that he had brought an action for the price, in which the plaintiff pleaded payment into court of £42, and that he had received the same in full satisfaction of the price and value of the range, and of fixing the same. On demurrer, the plea was held to be bad. Alderson, B., said:

"Formerly, when an action was brought for the price of work agreed to be done at a stipulated rate, the defendant was not allowed to make any deduction from that stipulated price in respect of the plaintiff's having failed properly to perform his contract, but was driven to his cross-action for the breach of it. In this respect the law is now settled otherwise by the case of Mondel *v.* Steel. But the present plaintiff may maintain an action against the defendants for negligence in the performance of the work, unless his defense to the former action for the price of the goods, had been to show that the work and goods were of no value whatever to him."

This last qualification of the plaintiff's right of action receives no support from the case of Mondel *v.* Steel. It is difficult to see why the rule should be different where the plaintiff recovers nothing, and where he recovers nominal damages.

If the present claim was formerly pleaded and evidence was offered but ruled out by the court, the plaintiff is barred, for he should have taken exception to the exclu-

(a) Mondel *v.* Steel, 8 M. & W. 858.

(b) 15 M. & W. 598.

sion of the evidence.(a) But though the claim was pleaded in the former action, if judgment was allowed to be taken by default for the whole amount, the plaintiff is not barred.(b) Where the present plaintiff defended a suit for the price of a chattel, on the ground that the contract was entirely different from that set out in the declaration, he is not now barred in an action for breach of warranty.(c) And it has been said generally in New York that where the fact upon which the defense is based is necessarily fatal to the whole action, the defense is one to the merits, and not in recoupment;(d) and therefore the defendant in such a suit is not barred from thereafter maintaining an action for the breach of contract.

§ 1073. **Failure to recoup does not bar action for same cause.**—If, however, the present plaintiff might have used the wrong of which he complains by way of recoupment in a former action against him by the defendant, a failure so to do will not bar the action.(e) In Davis *v.* Hedges (f) the plaintiff sought to recover damages for the improper

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(a) Beall *v.* Pearre, 12 Md. 550.

(b) Bascom *v.* Manning, 52 N. H. 132.

(c) Earl *v.* Bull, 15 Cal. 421.

(d) Dunham *v.* Bower, 77 N. Y. 76.

(e) Barth *v.* Burt, 43 Barb. 628.

(f) L. R. 6 Q. B. 687, 689. The contrary opinion seems to have been held by the Supreme Court of New York in an early case. In Grant *v.* Button, 14 Johns. 377, Button sued Grant for not doing work, as a carpenter, in a workmanlike manner. The defendant pleaded the general issue, and a former action by him as plaintiff, for his pay for the same work. It was proved that on the former action the plaintiff in this suit offered evidence that the work was unskilfully done, but that the justice excluded the evidence, and gave judgment for the then plaintiff, on the ground that the defendant was bound by his bargain. On this evidence judgment was given by the justice in this suit for the defendant in error (the plaintiff below, Button). But on *certiorari* the Supreme Court said that the plaintiff was barred by the former judgment, and that the justice erred in refusing to admit the evidence in the former suit; and the judgment was reversed.

performance of certain work. It appeared that the defendant had brought an action for the price, which the plaintiff had settled by paying the full amount. The defendant contended that as the plaintiff might have set up the negligent performance of the work in that action, he could not now maintain this action. Hannen, J., after citing the language of Parke, B., in Mondel *v.* Steel,(a) said :

"The particular point decided in Mondel *v.* Steel was that a person who has in fact obtained, in an action brought against him, an abatement of the price of work done, by reason of a breach of contract in its execution, is not precluded from suing for special damage resulting from the breach of contract ; but it leaves undecided the question whether he was *bound* to obtain the abatement in the action in which he was a defendant, or might recover it as damages in a cross-action. . . . . It is clear that before any action is brought for the price of an article sold with a warranty, or of work to be performed according to contract, the person to whom the article is sold, or for whom the work is done, may pay the full price without prejudice to his right to sue for the breach of warranty or contract, and to recover as damages the difference between the real value of the chattels or work and what it would have been if the warranty or contract had not been broken. Is there any reason why he should be deprived of this right by the mere fact of his opponent having commenced an action for the price? We think that there is none, and that there are some strong reasons wny he should not."

The judge then said that the defendant might not, at the time of action, be able to ascertain the amount of damage sustained ; that instead of avoiding circuity of action, by compelling the defendant to allege his damages by way of defense, it would only complicate litigation, as the defendant could not show consequential damages by way of defense, but could bring another action to recover these, and that it would be difficult to

(a) 8 M. & W. 858.

discriminate between the items to be allowed in each action.

"We have, though not without some doubt, come to the conclusion that the better rule is, that the defendant has the option, if he pleases, to divide the cause of action, and use it in diminution of damages, in which case, as Parke, B., says, he is concluded to the extent to which he obtained, or was capable of obtaining, a reduction ; or he may, as in the present case, claim no reduction at all, and afterwards sue for his entire cause of action."

* So where suit was brought for breach of warranty in a sale of a horse, it was shown that the plaintiff had given his note for the price of the same horse, and paid it after suit, and it was objected that the evidence of breach of warranty should have been urged in that suit. The court held that the evidence would have been admissible, but that the now plaintiff was not bound to use it, and that the fact of his not having availed himself of it was no bar to the present suit.[1] **

§ 1074. **Payment not pleaded.**—* A question very analogous to this is, how far evidence of payments when not pleaded, or when made after the commencement of the suit, is admissible in the reduction of damages; and the more reasonable rule in the latter case would seem to be, that, in such case, proof of the payment is admissible to show that the plaintiff has not sustained the entire injury for which he claims compensation.[2] It is well settled, however, that after an action is brought and costs incurred, the defendant cannot bar the plaintiff's suit by paying the debt merely, without also paying the costs. And where such payment is made, the plaintiff will generally be entitled, if the costs are not paid, to take judg-

[1] Cook *v.* Moseley, 13 Wend. 277. Richardson *v.* Robertson, 1 M. & W. 463.

[2] Shirley *v.* Jacobs, 2 Bing. (N. C.) 88; Lediard *v.* Boucher, 7 C. & P. 1;

ment for nominal damages and his costs.[1] But if the payment is made in satisfaction of the debt, damages, and costs, then the verdict will be for the defendant.[2] A plea of payment into court of full satisfaction of all the causes of action in the declaration contained is good, being an answer to the damages as well as the debt.[3] But a plea of payment into court in debt, stating that the defendant never was indebted to the plaintiff to a greater amount than the sum paid into court, is bad, as not answering the damage for the detention of the debt.[4]** In an action on a note, a payment made on the note after suit brought, may be given in evidence to reduce the damages.(a) In New Hampshire it is held that, on the general issue, evidence of payment since suit brought may be given in mitigation. And, in such cases, it seems that the court has a discretion as to costs.(b)

§ 1075. **Recoupment after verdict.**—The principle of recoupment may be applied, in a proper case, after the plaintiff has obtained a verdict. For instance, where damages have been recovered in an action of tort, and the defendant has, in effect, satisfied them in part, the court will reduce the verdict *pro tanto*. And where the plaintiff had sued in trover for the value of goods in the defendants' possession, and after a verdict in his favor, the defendants had paid rent for the leasehold where the goods were, and which he was liable for, the court deducted the amount of the rent from the execution.(c)

[1] Belknap *v.* Godfrey, 22 Vt. 288.
[2] Thame *v.* Boast, 12 Q. B. 808.
[3] Triston *v.* Barrington, 16 M. & W. 61
[4] Lowe *v.* Steele, 15 M. & W. 380.

(a) Bischof *v.* Lucas, 6 Ind. 26.
(b) Dana *v.* Sessions, 46 N. H. 509.
(c) Plevin *v.* Henshall, 10 Bing. 24.

CHAPTER XXXV.

THE MEASURE OF DAMAGES UNDER THE ENGLISH STATUTES OF EMINENT DOMAIN.

§ 1076. Damages under statutes.
1077. Appropriation of private property for public use.
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1080. Measure of damages where lands are taken.
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1100. Special rules.
1101. Damages include consequential injury.
1102. Damage caused by user.
1103. Benefits under the English statutes.
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1105. The English rules of interpretation criticised.

§ 1076. **Damages under statutes.**—* Many interesting questions on the subject of damages arise under particular statutes. There is a large class of cases where a statute, while directing or prohibiting some particular act, omits to annex any penalty, or to prescribe any measure of damages. In these cases, the party aggrieved by the forbidden act or omission has his remedy at law. "The neglect of a compulsory statute which annexes no penalty

to the transgression, will found an action at common law to those who have interest, ordaining the defendant either to do what the statute requires, or to pay damages."[1] The damages in such cases are entirely at large. In reference to acts of this kind, the Court of Exchequer in England has held this language: "Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage, some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, then it is not necessary to allege special damage."[2] There is another class of cases where the legislature, following out the idea of the Aquilian law, has endeavored to put a stop to all inquiry into the actual damages by fixing an arbitrary sum as the measure of relief. There are others where, in order to punish some particular act, it gives double and treble damages.

§ 1077. **Appropriation of private property for public use.**— There is perhaps, however, no class of questions belonging to this branch of our subject, so important as those which grow out of the statutes under which public works of various kinds are carried on, and by which compensation is provided for injury that may be sustained by private proprietors in the prosecution of the work. The right of the government to take private property for public use is one of vast importance, and the power one

[1] Lord Kaims, Prin. of Eq. book i, part i, ch. v, p. 179.

[2] Chamberlaine *v.* Chester & B. Ry. Co., 1 Ex. 870.

of indispensable necessity; but great care is required so to exercise the power that individuals shall not be sacrificed to the community. Keeping this general principle in view, we proceed to examine some of the cases growing out of the statutes founded on what is called the Right of Eminent Domain.**

§ 1078. **English statutes and decisions.**—We shall first proceed to make a brief examination of the English decisions, these for the most part being applications of very general principles; we shall then examine the American cases, in which the matter is much complicated by the necessity the courts have been under of applying and interpreting positive constitutional provisions. *An English statute declared that a railway company should make full compensation for all damages sustained by any parties by reason of the exercise of the powers of the company; and it also prescribed the mode of ascertaining the amount of compensation where any party should have been injuriously affected by the work, and for which they should not have received satisfaction.[1] Under this act it was held, that where the proximity of a railway crossing to a private road diminished the value of the property (and Lord Campbell, C. J., intimated that the mere passage of the trains close to the house would have the same legal effect), this would give a right to redress;** and the court said: "The depreciation is caused by that being done which, but for the powers contained in the Act of Parliament, would have been actionable. That criterion is very fairly suggested by the counsel for the defendants."[2]

§ 1079. **Lands clauses consolidation act.**—The statute above referred to furnishes the chief general legislation

[1] 8 & 9 Vict., c. 20, § 6.

[2] Glover *v.* N. Staffordshire Railway Co., 16 Q. B. 912, 923.

on the subject of compensation for the taking of private property. By a long series of decisions, its provisions have been interpreted and applied, and the rules on the subject in England may be said to be well defined. When we come to examine the American law, we shall find that, beginning by producing results very different in the two countries, the principles of decision have recently shown a tendency towards assimilation, while in many recently adopted State constitutions one underlying principle of the English legislation has been incorporated into the fundamental American law, so that now English precedents are cited, and often treated as of authority in our courts, where a generation since they would certainly have been regarded as not applicable. We shall begin with a consideration of the English decisions, as best preparing the way for the examination of the law of our own courts.

§ 1080. **Measure of damages where lands are taken.**— Where lands are taken, and there is no question of injury to other lands, the owner recovers the value of the land, and all damages resulting from his compulsory eviction. Such damages include, if the owner is in occupation, the cost of removal of furniture and goods, the diminution in value of stock owing to the necessity of removal or sale, any additional expenses incurred in finding equally convenient premises, and the probable diminution in the value of the owner's good-will.([a]) So recovery has been permitted for diminution in value of a reservoir built to supply mills, by reason of a taking of land on which the mills were to be built;([b]) for damage by severance of land used as agricultural land, but suita-

([a]) Cripps on Compensation, p. 95.
([b]) Ripley *v.* Great N. Ry. Co., L. R. 10 Ch. 435.

ble for building purposes; [a] and for good-will of business premises.[b]

§ 1081. **Compensation must be for value to owner.**—In accordance with the general principles governing the law of damages, the English courts have always held that it is the value *to the owner*, and not to those who acquire permission to take the land, that must be allowed for. Thus in Stebbing *v.* Metropolitan Board of Works,[c] the plaintiff was rector of three parishes in London in the churchyards of which burials were prohibited. The defendants being authorized to take part of this land for a street, Cockburn, C. J., said:

"It is intended that he shall be compensated to the extent of his loss, and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it. The plaintiff, as rector, could never have parted with these churchyards, and therefore to him they were perfectly valueless. The Metropolitan Board, it is true, will be able to apply the land to purposes which will give it an increased value, but that is no loss to the rector."

§ 1082. **Damage subsequently arising.**—A question by no means so easy of solution is whether, after one assessment of damages has been made, inasmuch as this is supposed to cover future damages, there can be another assessment if unforeseen damages subsequently arise.[d] As we have already seen,[e] at common law there is no reason why new actions may not be brought if a new damage gives a new cause of action. The question

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[a] Queen *v.* Brown, L. R. 2 Q. B. 630.

[b] White *v.* Commissioners of Works, 22 L. T. N. S. 591.

[c] L. R. 6 Q. B. 37, 42.

[d] On this point *cf. In re* Ware *and* Regent's Canal Co., 9 Ex. 395; Lawrence *v.* The Great Northern Ry. Co., 16 Q. B. 643; Lancashire & Yorkshire Ry. Co. *v.* Evans, 15 Beav. 322, with Croft *v.* London & N. W. Ry. Co., 3 B. & S. 436.

[e] § 88.

is generally whether the first verdict embraces everything, or whether an independent cause of action has subsequently arisen. So too, here, although the general design of the statute is to provide for a single assessment of damages, its language does not necessarily restrict the property-owner to a single action. Mr. Cripps, in his valuable treatise on the principles of the law of compensation(a) for injury under the statute, says: "In respect of matters made lawful by statute, the owner must show under what provisions of the statute he is claiming compensation, and it does not appear that the Lands Clauses Consolidation Act, 1845, contains any provisions for a second inquiry as to the amount of compensation payable to an owner." But in a proper case is not the provision(b) that the party may proceed in cases in which the promoters "shall not have made satisfaction" sufficient?

§ 1083. **Good-will.**—With regard to the value of the good-will, the following remarks, which we take from Mr. Cripps' work, already referred to, are specially deserving of attention: (c)

"Good-will is the probability of the continuance of a business connection, and its value is fixed at a certain number of years' purchase, according to the nature of the particular trade or business. When lands, however, are taken under compulsory powers, the good-will is not purchased by the promoters, but remains the property of the trader, and the loss suffered by him is the diminution in its value in consequence of his compulsory ejectment from the premises he is occupying. So far from the good-will being purchased or destroyed by the promoters, there are many cases in which the diminution in its value is hardly appreciable, although the trade premises have compulsorily been taken. If a business is of a wholesale character, or is one which

(a) 2d ed., p. 129.
(b) § 68.
(c) Cripps on Compensation, p. 95.

consists of orders from a widely-extended area, a compulsory change of trade premises would be productive of small loss. If, in addition, convenient premises can be acquired in the immediate neighborhood of the premises taken, the loss incurred through diminution in the value of good-will becomes merely nominal, and the owner's only claim to compensation is in respect of any reasonable expenses which the taking of equally convenient new premises has rendered necessary. On the other hand, there are cases in which the diminution in the value of a good-will may almost equal the entire value of a good-will. This is the case where a business is retail and local, depending on neighboring customers, and no suitable premises can be found in the locality within which the business connection extends."

§ 1084. **Nature of the interest taken.**—The amount of compensation must depend upon the nature of the interest taken. Thus, if the interest be a fee, the owner recovers a sum which represents the annual value to him of the land multiplied by the number of years' purchase, which depends of course upon the interest which the property should yield. At four per cent. the number of years' purchase would be twenty-five. In the case of leaseholds, the value of the term depends upon the difference between the annual rent and the value to use. This difference accordingly is multiplied by the number of years' purchase. The present value to the owner of a reversionary interest who is receiving no present benefit is arrived at by calculating the present value of the reversion if deferred to the end of the period when it falls in. If the owner of the reversion is deriving some present income from the land, as when he is getting some rent, although not so much as the property will be worth at the end of the intervening estate, the present value of what he will get for the intervening period must be added to the value of an annuity based on the future prospective value, but deferred for the same period.([a])

([a]) Cripps on Compensation, p. 97.

§ 1085. **Value of lands for all profitable uses.**—In England it seems to be settled that the value to which the landowner is entitled is not merely the value of the use to which the property is at the time of the taking put, but may be enhanced by the possibility of other more profitable employment; that is, the compensation must include the potential in the actual value.(a)

§ 1086. **Remote damages excluded.**—Where lands are taken, and the owner obtains compensation for eviction, he cannot obtain damages for such losses as would be considered in an ordinary common-law action remote, speculative, or hypothetical. Thus where a market-gardener was, by reason of his garden being taken, unable to warrant his seeds, it was held that the consequent depreciation in value of the seeds was too remote.(b)

§ 1087. **Certainty.**—In the same way the ordinary rules as to certainty of proof prevail. Thus where the value of a good-will is concerned there is the usual necessity for distinguishing between certain and uncertain profits, a business established and not established. Where A. carried on an old established business at No. 11 P. St. and being in expectation of having these premises taken for public use, he obtained a lease of No. 10, and began to use these premises in connection with his business, under these circumstances, on No. 10 being taken, he was held entitled to compensation for the good-will of the business which he was about to transfer there.(c)

(a) Ripley *v.* Great Northern Ry. Co., L. R. 10 Ch. 435; Wadham *v.* Northeastern Ry. Co., 16 Q. B. Div. 227; Bourne *v.* Mayor of Liverpool, 33 L. J. Q. B. 15.

(b) *In re* Clarke *and* Wandsworth Local Board, 17 L. T. N. S. 549.

(c) White *v.* Comrs., 22 L. T. 591.

§ 1088. **Lands injuriously affected where no land is taken.** —The English statute provides for the case of lands "injuriously affected," and under this head when no land is taken, four rules are laid down: *first*, the damage must result from an act made lawful by the statute authorizing the work; *second*, the damage must be such as would have been actionable but for the statutory powers; *third*, the damage must be an injury to lands, and not a personal injury, or an injury to trade; *fourth*, the damage must be occasioned by the construction of the authorized works and not by their user.

§ 1089. **Damage must result from act made lawful.**—The first rule is merely the recognition of a general principle which must be applied wherever compensation is given for indirect injuries of this nature. The statute authorizing the work empowers those acting under it to do certain specified acts, and make them responsible for the damages occasioned by these and none other. For acts of negligence or other wrong-doing they are responsible without reference to the statute.([a])

§ 1090. **Must be such as would have been actionable but for statute.**—The statute does not *enlarge* any right of redress that the owner might have had at common law. There may be items of damage which but for the statute would be recoverable, and which under the statute will not be allowed, for the statute relates solely to lands or an interest therein injuriously affected by the *execution of the works*. Consequently the rule exactly stated would be, that the damage must injuriously affect lands or an

([a]) Caledonian Ry. Co. *v.* Colt, 3 Macq. H. L. C. 833; Broadbent *v.* Imperial Gas Co., 7 De G. M. & G. 436; Brine *v.* Great Western Ry. Co., 2 B. & S. 402; Clowes *v.* Staffordshire Potteries W. Co., L. R. 8 Ch. 125; Clothier *v.* Webster, 12 C. B. N. S. 790; Biscoe *v.* Great Eastern Ry. Co., L. R. 16 Eq. 636; Uttley *v.* Local Board of Health, 44 L. J. C. P. 19.

interest therein, and must be the consequence of an act in the execution of the works which, had they not been authorized, would have given a right of action against the original proprietor. Stated in this way we see at once why a personal injury, or an injury to trade, or an injury caused by the user and not by the construction of the works, cannot in the case where lands are injuriously *affected*, be allowed for.[a]

In Caledonian Railway Co. *v.* Ogilvy,[b] a case in which a railway passed within a few yards of a gentleman's lodge, across a public road forming the chief access to his residence, so that he was liable to constant stoppages by the closing of the gates, the Lord Chancellor said :

"These Acts of Parliament are, as unfortunately is too often the case, loosely worded, but the construction that is put upon this expression, 'injuriously affected,' in the clauses in the Act of Parliament which gives compensation for injuriously affecting lands, certainly does not entitle the owner of lands, which he alleges to be injuriously affected, to any compensation in respect of any act which, if done by the railway company without the authority of Parliament, would not have entitled him to bring an action against them. I purposely guard myself by putting it in that way, because I am far from admitting that he would have a right of compensation in some cases in which, if the Act of Parliament had not passed, there might have been not only an indictment, but a right of action. And the necessity of so guarding myself is made apparent by one of the last cases quoted by Mr. Anderson, the case of Greasley *v.* Codling, which, if the law be applicable to a railway, would certainly entitle everybody who is stopped for a minute while the gates are shut

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[a] Caledonian R. Co. *v.* Ogilvy, 2 Macq. H. L. C. 229; *Re* Penny, 7 E. & B. 660; Ricket *v.* Metropolitan Ry. Co., L. R. 2 H. L. 175; Metropolitan Board of Works *v.* McCarthy, L. R. 7 H. L. 243; Hammersmith & C. Ry. Co. *v.* Brand, L. R. 4 H. L. 171; Rhodes *v.* Airedale D. Comrs., 1 C. P. Div. 402.

[b] 2 Mac. Q. H. L. C. 229, 235.

to an action for damages ; because it would be said, under the authority of that case, which I think is a very correct decision, that where an act is done, such as shutting gates across a public road without the authority of Parliament, that gives the parties a right of action. If, therefore, the Act of Parliament did not mean to exclude the right of compensation in some cases, in which, if the act had not passed, there would have been redress, every person who is stopped for a moment while the gates of a railway are shut at a level crossing would be entitled to an action.

"But, I apprehend, it is clear that in those Acts of Parliament, the Legislature means to authorize these public companies, for the convenience and advantage of the public, to do acts with regard to which they are not only relieved in respect of what they are doing from indictments at the instance of the public, or, speaking more properly, at the instance of the Crown, but they are also entitled to do them without being liable to redress at the suit of individuals. That cannot be better illustrated than by the case which has been put by Mr. Anderson, that they are authorized to have a railway upon a crossing having gates to prevent persons passing along the road at times when it would be dangerous by reason of trains being near at hand. That necessarily, therefore, occasions a stoppage to persons, which, if there were not an Act of Parliament, would entitle them to bring an action against the railway company. It is clear that the Legislature meant to exclude any right of action in such a case as that.

"Now, my Lords, that being the case, suppose that, without any Act of Parliament having been passed for making this railway, certain speculators had taken upon themselves to make a railway across a public road, and had erected gates, certainly the owner of the estate might, with respect to any detention occasioned to him by the closing of those gates, bring an action against the makers of the railway, and, as he might do this *toties quoties*, he would probably have more frequent rights of action than other subjects of Her Majesty. But it would only be a more frequent repetition of the same damage ; it would not be any damage different from that which might be sustained by any other subjects of Her Majesty ; for all attempts at arguing that this is a damage to the estate is a mere play upon words. It is no damage at all to the estate, except that the owner of that estate

would oftener have a right of action from time to time than any other person, inasmuch as he would traverse the spot oftener than other people would traverse it.

"It appears to me, therefore, clear by the Acts of Parliament, and by the intention of the Legislature, that there is no right of compensation whatsoever ; for, except for any actual detention, no right of action would have existed if the making of the railway had not been authorized by Parliament, and the detention caused by the necessary closing of the gates is certainly made lawful by the act."

§ 1091. **Rule of general application.**—The rule is understood to be one of general statutory construction, and applicable in any case whether under the particular sections of the lands clauses act, or any other statute giving damages generally for the exercise of the powers of the grantee of a franchise. In New River Company *v.* Johnson (a) this question was discussed by the judges of the Queen's Bench. The appellants in the execution of works authorized by a local act, which provided that the undertakers should "make full compensation to all parties interested for all damages sustained by them through the exercise of such powers," intercepted water from percolating underground into a well owned by respondent, and also abstracted from the well water which had so percolated and was in it. It was held by all the judges that as no action would lie at common law for such an injury, none could be maintained under the statute. Cockburn, C. J., said :

"The recent decisions have fully established the principle, which is also in accordance with common sense, that acts of Parliament which give to parties injured a right to compensation, must be taken to mean that while they confer powers of compulsory interference with the rights of property, and take away from the owners of property the right to bring actions,

(a) 2 E. & E. 434, 442.

they provide that parties injured by the exercise of these powers shall not be damnified by being deprived of their right of action; and, correlatively, that such persons shall have no right to compensation unless the injury which they have sustained by the exercise of the powers is such as would, but for the provisions of the acts, have been actionable."

Wightman, J., referred to "the general principle" that statutory compensation is to be thus restricted. Crompton, J., said that it was "an universal rule." Blackburn, J., expressed himself as of the same opinion.([a])

§ 1092. **Limitations of the rule.**—As we have seen in one of the cases just cited, Lord Cranworth said that it did not follow that a proprietor would have a right of action in every case in which, if the act of Parliament had not passed, he could have maintained one.([b]) This remark was quoted with approval in the subsequent case of Ricket *v.* Metropolitan Ry. Co.,([c]) in which it was held that where access to a public house was rendered temporarily inconvenient by the construction of the works, but there was no structural damage to the premises, the occupier could not recover for interruption of business. And this limitation upon the rule seems to be admitted to be a necessary deduction from the rule itself in Beck-

([a]) Notwithstanding this a recent decision of the Court of Appeal should be noticed here. *In re* London T. & S. Ry. Co. *and* Trustees of Gower's Walk Schools (24 Q. B. Div. 326) was a case where the injury complained of was obstruction of lights. It was questionable whether an action could be maintained at law. The Master of the Rolls said that "but for superior authority" he should have been inclined to say that unless an act says so in clear and distinct terms it should not be held to give more than legal damages; but that in Essex *v.* Local Board for Acton (14 App. Cas. 153) the House of Lords had laid down a contrary principle. This can hardly be. At any rate we cannot assume it to be the fact until it has been admitted by the House of Lords. The case in the Court of Appeal is unsatisfactory, as it is difficult to make out the precise ground of decision.

([b]) Caledonian Ry. Co. *v.* Ogilvy, 2 Macq. H. L. C. 235.

([c]) L. R. 2 H. L. 175.

ett *v.* Midland Ry. Co. ;([a]) in this case the plaintiff was the owner of a house fronting on a highway, on a portion of which, opposite the house, the defendants, a railway company, erected an embankment, thereby narrowing the road from fifty to fifty-three feet, and materially diminishing the value of the house for letting and selling, and obstructing the access of light and air.

From the foregoing cases it would appear that the owner, to recover compensation for lands "injuriously affected," must show that he has sustained a particular damage; that the damage must be one for which he might have maintained an action if the act had not been authorized; that the injury is one to the estate, and that obstruction or personal inconvenience or interference with trade will not be enough, although *that* might have been actionable had the works not been sanctioned; finally, the damage must be such as is sustained in respect of the ownership of the property, and not in respect of any particular use to which it may from time to time be put. "The property is to be taken in *statu quo*, and to be considered with reference to the use to which any owner might put it in its then condition, that is, as a house." ([b])

§ 1093. **Access to public thoroughfares, navigable rivers, etc.**—The disposition made by the English courts of the question of redress for interference with access from private property to streets and highways (and the case of water highways, etc., is the same) is particularly deserving of attention. Under the rule already stated, if the owner has suffered no injury to his right of ownership he would have had no right of action in respect of his interest in lands, if

([a]) L. R. 3 C. P. 82.

([b]) Per Willes, J., p. 95.

there had been no statutory powers; consequently he cannot maintain a claim to compensation under the statute.(a) The claim, therefore, seems to be limited and defined by the right of access. If the access is taken away or rendered less convenient, and the value of the lands depreciated, even though they do not immediately abut on the public highway or river, the plaintiff can recover; but if the obstruction is only temporary, or an inconvenience, diverting the public and causing a loss in custom or trade, the damage, as it would not have given the owner any right of action if there had not been any statutory powers, is not recoverable.(b) On the same principle, where the municipal authorities of a borough claimed damages for deprivation of access to a sewer, it was held by the Court of Appeal that as access had not been prevented, but only rendered less easy and inconvenient, the plaintiffs had no right to compensation.(c)

§ 1094. **Metropolitan Board of Works v. McCarthy.**—In the leading case of Metropolitan Board of Works *v.* McCarthy (d) it was held that to found a claim for compensation for an interest in land "injuriously affected" there must be an injury or damage not temporary but permanent, peculiarly affecting the house or land; that a mere personal inconvenience, obstruction, or damage to trade or

(a) Caledonian Ry. Co. *v.* Ogilvy, 2 Macq. H. L. C. 229.

(b) Queen *v.* Eastern Counties Ry. Co., 2 Q. B. 347; Beckett *v.* Midland Ry. Co., L. R. 3 C. P. 82; Metropolitan Board of Works *v.* McCarthy, L. R. 7 H. L. 243; Lyon *v.* Fishmongers' Co., 1 App. Cas. 662; Chamberlain *v.* West End of London Ry. Co., 2 B. & S. 605; Caledonian Ry. Co. *v.* Walker's Trustees, 7 App. Cas. 259; King *v.* London Dock Co., 5 A. & E. 163; Ricket *v.* Metropolitan Ry. Co., L. R. 2 H. L. 175; Wood *v.* Stourbridge Ry. Co., 16 C. B. N. S. 222; Herring *v.* Metropolitan Bd. of Wks., 19 C. B. N. S. 510; Glover *v.* North Staffordshire Ry. Co., 16 Q. B. 912.

(c) Mayor of Birkenhead *v.* London & N. W. Ry. Co., 15 Q. B. Div. 572.

(d) L. R. 7 H. L. 243.

the good-will of a business was not enough, though any one of them might but for the act have been the subject of an action against the person causing it. The plaintiff was lessee or occupier of a house in close proximity to a draw-dock which opened into the river Thames. He had no more right to the use of this dock than any of the public, but his use of it was constant. This dock was entirely destroyed by the Thames embankment, and the premises being thereby permanently damaged and diminished in value, either as premises to sell or occupy, and with reference to the uses to which any owner or occupier might put them in their then state and condition, it was held that the plaintiff was entitled to compensation. The Lord Chancellor (Lord Cairns) said that he proposed to accept entirely the test usually applied, viz.: to consider whether the act complained of would have given a right of action if the works had not been authorized by the act. He distinguished the case from Ricket *v.* Metropolitan Ry. Co.(a) as follows: "There was an interruption—only a temporary interruption—to a particular trade carried on in particular premises, and the claim made was not a claim for injury to the property at all; it was a claim in respect of loss suffered in carrying on a trade," and with regard to the foundation of the right to compensation, said he should not be disposed to find fault with a definition of it suggested by Thesiger, Q. C., *arguendo*, as reconciling all the cases—"that where by the construction of the works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compen-

(a) L. R. 2 H. L. 175.

sation if, by reason of such interference, the property, as a property, is lessened in value."[a] Lord Chelmsford said that the result of the decision was that there must be an injury to the house or land; that a mere personal obstruction or inconvenience or damage to trade or goodwill was not enough, although of such a nature that, but for the act, it might have been the subject of an action. He adopted the definition of Thesiger, Q. C., with the qualification that when the right is possessed by the house or land owner in common with the public, there must be something peculiar to the right, in connection with the property affected, to distinguish it from that which is enjoyed by the rest of the world.[b] Lord Penzance said:

"There are many things which a man may do on his own land with impunity though they seriously affect the comfort, convenience, and even pecuniary value which attach to the lands of his neighbor. In the language of the law these things are '*damna absque injuriâ*' and for them no action lies. Why, then, it may surely be asked, should any of these things become the subject of legal claim and compensation, because instead of being done, as they lawfully might, by the original owner of the neighboring land, they are done by third persons who for the public benefit have been compulsorily substituted for the original owner? It may reasonably be inferred that the Legislature in authorizing the works and thus taking away any rights of action which the owner of land would have had if the works had been constructed by his neighbor, intended to confer on such owner a right to compensation co-extensive with the rights of action of which the statute had deprived him. But on no reasonable ground, as it seems to me, can it be inferred, that the Legislature intended to do more, and actually improve the position of the person injured by the passing of the act." [c]

In answer to the objection that the decision opened too wide a door to claims, he said:

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[a] pp. 253, 254.
[b] p. 256.
[c] p. 261.

"All claim for compensation will vanish as, receding from the highway" (or waterway) "the case comes into question of lands of which (though their owners may have used the highway and found convenience in so doing) it cannot be predicated and proved that the value of the lands depends on the position relatively to the highway which they occupy."

In other words, the usual rules as to certainty of proof and remoteness apply. Lords Hatherly and O'Hagan both approved the definition suggested by Thesiger, Q. C., but the latter, while agreeing in the result, said that if it were a new question he should have been strongly disposed to take a different view. He said: (a)

"If the matter were *res integra*, and ungoverned by any authority, I think on the facts as found it would be extremely difficult to answer the questions submitted to your Lordships, whether the plaintiff's interest in his premises is injuriously affected within the meaning of the Lands Clauses Consolidation Act, 1845? in any way but one. The policy of that act I apprehend to have been to prevent private caprice or selfishness from interfering with the prosecution of works designed for the public benefit; but to do this with strict regard to individual rights by securing ample compensation in every case in which individual sacrifice or inconvenience is found to be essential to the general good. It never contemplated that the community should profit at the expense of a few of its members, and, as the condition of redress, it only required proof by the owner of injury to his property. In the particular case before your Lordships, if the question had been as to taking the whole of this property, compulsorily from the owner of it, the principle of compensation would have been ample, full, and complete, so as to give a full indemnity to the individual. For my part, I confess I cannot see why that principle is not to be applied in the case of damage to premises, which may be more or less according to circumstances, and which in a conceivable case may absolutely be a destruction, or a taking away of the whole property, as much as if it had been in the first instance purchased against his will from its owner. I confess, my Lords, that if the case were

(a) p. 261.

entirely new, I should scarcely be disposed to agree in some observations which have fallen from my noble and learned friend who last addressed your Lordships. I should have doubted whether it was within the view of the framers of this Act of Parliament to make the possibility of bringing an action, if the Act of Parliament had not existed, a condition of compensation under the statute. I should have been very much inclined to agree with the strong observations made by Lord Westbury in Ricket's Case,(a) to the effect that there really is not in the statute itself anything to justify the importation of a narrow construction of that description. It appears to me, or it would, as I have said, appear to me if the matter were *res integra*, and unaffected by decision, that wherever there is injury there ought to be compensation, and that the statutable claim which is now newly established, with new machinery for enforcing it, needs no help from any operation of ancient law.

"However, it appears to me to be now quite needless to raise that question, upon which there is a conflict of authority, which I do not think has yet been absolutely settled; because in the case before the House, whether it be necessary to make the supposition of an action independently of the statute, or whether the contrary view be taken, the matter is none the worse for the claimant here.

"Even if the thing complained of be not within the new view of the clause with which we are dealing, unless it might have been the subject of an action, it seems to me that under the circumstances here an action would have lain. No doubt what is merely a common injury to all the world may be indisputable, but is not actionable. What is injurious in one way to all may be supposed to be good in another way for all, and the common injury may be counterbalanced by the common benefit. But it is established law, in a case to which I think reference has already been made—the case of Ashby *v.* White (b)—that if a person has sustained a particular damage beyond that of his fellow-citizens, he may maintain an action in respect of that particular damage; and that is explained and enforced in the very learned note by Mr. Smith on that case.(c) Now here the plaintiff seems to

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(a) L. R. 2 H. L. 200 *et seq.*

(b) 2 Ld. Raym. 938; 1 Salk. 19.

(c) Smith's L. C., 4th ed., vol. 1. pp. 185, 212.

me to have been clearly subjected to such a damage. He has a property which is so situated that the act, which may have been necessary or important for the public interest, has damaged it to a large extent, has damaged it permanently, and in such a way as to make it far less valuable by any change in the mode of using it. Is not this damage particular, and not such as the fellow-citizens of the claimant generally experience? How is he to be indemnified for his special loss by the infinitesimal advantage which may accrue equally to him and to each of them? It seems to me unreasonable and unjust that he should be made involuntarily to suffer for the public benefit, or that he should not be recompensed for the real and peculiar loss he has undoubtedly sustained. For such a loss I think he might have recovered in an action before the statute, and I believe that if the statute has not enlarged, it certainly has not diminished his right to make a like recovery in another way.

"Farther, I confess I should have great difficulty in holding that to entitle him to compensation the injury affecting his interest in his premises must have been, as was very powerfully urged at the bar, an injury to the structure or substance. From the access to the river by the dock they had been made more valuable; by the loss of that access their value was permanently lessened. Is not a lessening of value an injury to premises and an injury to the owner's interest in them? Why should a mere structural injury from infringement on a corner of the premises, or the removal of earth in contiguity to the walls, entitle to compensation, whilst an injury not structural, but direct and clear, and producing worse results to the unoffending owner—it may be one hundred-fold or one thousand-fold—be wholly remediless? It seems to me that here, again, a narrow qualification has been imported into the statute inconsistent with its policy and unwarranted by its terms. I do not see, with great respect to Lord Cranworth's opinion in Ricket *v.* The Metropolitan Railway Company,(a) that it ought to matter, as to the effect and estimate of a real injury to premises and their owner, whether it is accomplished by work done, beside, under, or upon them, or done at a distance from them, but so as directly and unmistakably to have been the cause of that injury, which equally damnifies the owner in either case.

(a) L. R. 2 H. L. 196.

"In my judgment, therefore, whilst an injury common in kind and in degree to the claimant and all the public, or merely personal to him, and not arising from the deterioration of the premises, or so remote as to be difficult or impossible of reasonable appreciation, may probably be held to form no claim to compensation, when, as here, the injury is particular, consists in the diminution of the value of a holding, is perfectly appreciable, and, in the particular case, has actually been appreciated to a considerable amount, I am strongly of opinion that it gives a clear title to compensation under the statute."

§ 1095. **Damage to access must be proximate.**—In Caledonian Ry. Co. *v.* Walker's Trustees,[a] it appeared that before the construction of the appellants' works the property of the respondents had a frontage to Canal Street, in Glasgow, and by that street (at a distance of about 90 yards) direct access to one of the main thoroughfares of the city. By means of the works of the appellants, this access had been cut off and a poorer one substituted for it. The Lord Chancellor, Lord Selborne, laid down the following propositions as having been established by the cases: 1. When a right of action, which would have existed if the works had not been authorized by statute is merely personal, without reference to land or its incidents, compensation cannot be had under the acts. 2. Damages arising, not from the execution of the works, but from subsequent user, cannot be compensated. 3. Loss of trade or custom by reason of work not otherwise directly affecting the house or land, in or upon which the trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation. 4. The obstruction by the execution of the work, of a man's direct access to his house or land, whether by public or private way, is a

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[a] 7 App. Cas. 259.

proper subject for compensation.[a] Lord O'Hagan thought the case wholly undistinguishable from Metropolitan Board of Works *v.* McCarthy, and Lord Watson seemed to be of the same opinion. In this case it was argued that damages for obstruction to access to a public road would be too remote where the obstruction was not "immediately *ex adverso*." But the court refused to lay down any such rule. The Lord Chancellor, Lord Selborne, said :

"A right of access by a public road to particular property must, no doubt, be proximate, and not remote or indefinite, in order to entitle the owner of that property to compensation for the loss of it ; and I apprehend it to be clear that it could not be extended in a case like the present to all the streets in Glasgow through which the respondents might from time to time have occasion to pass, for purposes connected with any business which they might carry on upon the property in question. But it is sufficient for the purposes of the present appeal to decide that the respondents' right of access from their premises to Eglinton Street at a distance of no more than ninety yards, was direct and proximate, and not indirect or remote." [b]

§ 1096. **Thesiger's rule.**—The general rule that we have been here considering has been put in the following form : When, by the construction of works, there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives *an additional market value to such property*, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation if by reason of such interference the property as a property is lessened in value.

This definition was, as we have seen, relied on by The-

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[a] p. 276.
[b] p. 285.

siger, Q. C., in argument in Metropolitan Board of Works *v.* McCarthy, and accepted as a guide by Lord Chelmsford. It is important as calling attention to the necessity of proof that the market value has been affected. Under this rule the owner can recover for any structural damage to buildings caused by interference with the support to which they are entitled ;([a]) for destruction or interference with an easement ; for interference with access to a ferry ;([b]) for obstruction of a private road ;([c]) for obstruction of ancient lights ;([d]) for diminution of the flow of water to which a riparian owner has a prescriptive right.([e])

On the other hand, interference with a flow of water to which there is no prescriptive right (as with the flow of underground water), or interference with the privacy of lands, owing to their being overlooked from a railway embankment, produces no such damage as in the absence of the statutory powers would have given a right of action, and hence in such cases compensation is not given ; and so of the right of access to a road shown on a plan, but in which the claimant had no vested or certain interest.([f])

§ 1097. **Damage must be to lands.**—Such is the language of the statute. And it follows that here the loss of good-will which we have seen is compensated in case lands are *taken* (since it is often a necessary consequence

([a]) Metropolitan Board of Works *v.* McCarthy, L. R. 7 H. L. 243.

([b]) Queen *v.* Great Northern Ry. Co., 14 Q. B. 25.

([c]) Glover *v.* North Staffordshire Ry. Co., 16 Q. B. 912.

([d]) Eagle *v.* Charing Cross Ry. Co., L. R. 2 C. P. 638 ; Clark *v.* School Board, L. R. 9 Ch. 120; Duke of Bedford *v.* Dawson, L. R. 20 Eq. 353.

([e]) Bush *v.* Trowbridge Waterworks Co., L. R. 19 Eq. 291 ; Stone *v.* Mayor of Yeovil, 2 C. P. Div. 99.

([f]) Queen *v.* Metropolitan Board of Works, L. R. 4 Q. B. 358 ; *In re* Penny *and* Southeastern Ry. Co., 7 E. & B. 660 ; Fleming *v.* Newport Railway Co., 8 App. Cas. 265.

of eviction), is not allowed for. The measure of damages is the diminution in market value; still, inasmuch as the good-will of a particular business may give a special value to the property, it cannot be lost sight of altogether. That and other facts may probably be given in evidence as bearing on the question of market value.[a] So mere personal loss or inconvenience is not a damage to any interest in lands, and does not entitle the owner to compensation.[b]

§ 1098. **No compensation for damages caused by user.**— It is the execution or construction of the works that gives the right to compensation; not the subsequent use of them. Hence for the latter the owner cannot be compensated.[c] It has been held by the English judges that this objection disposes of a claim on account of diversion of traffic from a ferry by a newly constructed railway bridge and foot-bridge for passengers, and that a further conclusive reason is that no action could have been maintained in the absence of statutory powers.[d]

In Hammersmith & C. Ry. Co. *v.* Brand[e] the question was whether one whose land has not been taken can recover compensation for vibration caused by the passing of trains and depreciating the value of the property. It was

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[a] Ricket *v.* Metropolitan Ry. Co., L. R. 2 H. L. 175; Beckett *v.* Midland Ry. Co., L. R. 3 C. P. 82; Queen *v.* Metropolitan Board of Works, L. R. 4 Q. B. 358; Metropolitan Board of Works *v.* McCarthy, L. R. 7 H. R. L. 243; Bigg *v.* London, L. R. 15 Eq. 376; Cameron *v.* Charing C. Ry. Co., 19 C. B. N. S. 764.

[b] Caledonian R. Co. *v.* Ogilvy, 2 Macq. H. L. C. 229; *In re* Penny *and* Southeastern Ry. Co., 7 E. & B. 660; Ricket *v.* Metropolitan Ry. Co., L. R. 2 H. L. 175; Queen *v.* Vaughan, L. R. 4 Q. B. 190.

[c] City of Glasgow U. Ry. Co. *v.* Hunter, L. R. 2 Sc. App. 78; Hammersmith & C. Ry. Co. *v.* Brand, L. R. 4 H. L. 171.

[d] Queen *v.* Cambrian Ry. Co., L. R. 6 Q. B. 422; overruled by Hopkins *v.* Great Northern Ry. Co., 2 Q. B. Div. 224.

[e] L. R. 4 H. L. 171.

held that there could be no recovery. Willes, J., thought that there should be a recovery because a right of action was taken away. Lush, J., agreed with this, and thought it clear that upon a construction of the provisions of the statutes involved, the legislature had intended that there should be compensation for *user*. Blackburn, J., the only one of the judges whose opinion was taken who thought the plaintiff could not recover, agreed that but for the statutes the plaintiff would have had an action as for a nuisance, but that the statutes contained no language showing a distinct intention to allow compensation for user. This appears to have been the view adopted by the House of Lords, but Lord Cairns dissented in a strong opinion, taking the ground that the intention of the statutes was that all damage should be compensated that was caused by the railroad as a "going concern." *In re* Penny (a) the question was made whether recovery could be had for vibration. The case was decided upon another point, but two judges intimated that for vibration *during the construction* recovery might be had, but not afterwards, for that would be a recovery for user.

§ 1099. **Land taken in part—Damages for severance.**—Where lands are taken in part, and compensation is claimed for injury to lands held therewith, the statute contains a provision authorizing damages for the severance of the parcels. The language of the statute is:

"Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works, or of any interest therein, belonging to the party with whom the question of dis-

(a) 7 E. & B. 660.

puted compensation shall have arisen, or which, under the provisions herein contained, he is enabled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special act, or any act incorporated therewith." (a)

And in another section:

"In estimating the purchase-money or compensation to be paid by the promoters of the undertaking, in any of the cases aforesaid, regard shall be had . . . . not only to the value of the land to be purchased or taken, ... but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special act, or any act incorporated therewith." (b)

§ 1100. **Special rules.**—Where part is taken and part left, the English courts have applied a totally different rule from that which is enforced, either where land is taken out and out, or where land not taken is injuriously affected, and this not upon the particular language of the statute, but on general principles, which deserve careful attention, because, as we shall see later, recent American Constitutions have adopted provisions regarding eminent domain resembling more closely the English statute than did the earlier instruments.

The first rule considered above—that compensation is only given for acts made lawful by statute—prevails here as everywhere else. For a wrongful act outside the statute, *e. g.*, for negligence in construction, the defendant is liable, not under the statute, but at common law. This

(a) Lands Clauses Consolidation Act, 1845, 8 & 9 Vict., c. 18, s. 49.
(b) Lands Clauses Consolidation Act, 1845, s. 63.

is, indeed, perhaps the only rule of universal application both in England and the United States.

The second rule—that the owner is not entitled to compensation except for matters which, if it were not for the statute, would have been actionable—becomes in the present case immaterial. The view taken is best shown in *Re* Stockport, Timperley & A. Ry. Co.(a), in which Crompton, J., said:

"But the question here is whether such rule is at all applicable to cases where part of the land is taken and compensation is given, not only for the value of the part taken, but for the rest of the land being injuriously affected, either by severance or otherwise; and I am of opinion that the distinction pointed out by Mr. Manisty is correct, and that the rule in question does not apply to such cases. Where the damage is occasioned by what is done upon other land which the company have purchased, and such damage would not have been actionable as against the original proprietor, as in the case of the sinking of a well, and causing the abstraction of water by percolation, the company have a right to say: We had done what we had a right to do as proprietors and do not require the protection of any act of Parliament; we, therefore, have not injured you by virtue of the provisions of the act; no cause of action has been taken away from you by the act. Where, however, the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say: It is by act of Parliament, and the act of Parliament only, that you have done the acts which have caused the damage; without the act of Parliament, everything you have done, and are about to do, in the making and using the railway, would have been illegal and actionable, and is, therefore, matter for compensation according to the rule in question. I think, therefore, that the distinction between cases where the land is taken, and the cases of obstruction of light, rights of way, etc., by acts done on other land, is well founded. This distinction is referred to by brother Blackburn, in the recent case of Chamberlain *v.* The Crystal Palace Company,(b) as having been taken in

(a) 33 L. J. Q. B. 251.
(b) 2 B. & S. 605.

former cases. I am of opinion that the premises in question were injuriously affected within the section of the Land Clauses Act as to compensation where land is taken, and that the jury have rightly included the damages for such injury in their verdict; and, consequently, that this rule for a *certiorari* should be discharged, with costs."

And the claimant, the owner of the cotton mill, was allowed to recover for danger of fire from trains passing.

§ 1101. **Damages include consequential injury.**—The third rule, that it is only for damages to the lands themselves in their marketable value that a recovery can be had, has little or no application here, because under the case just stated the claimant recovers for the whole consequential injury. Thus in the leading case on this subject,(a) the Duke of Buccleuch was the owner of a mansion on the banks of the Thames, with a large garden frontage thereon. An embankment was made, by means of which a large strip of dry land was made where the river had formerly flowed up to the garden, and a public road was made between the strip of land and the river. On this state of facts it was held that the loss of the use of the river frontage and the consequent loss of privacy, and the increase of dust and noise by the embankment and the road, were circumstances which must be considered as diminishing the selling value of the property, for which he was entitled to compensation. In this case, Mr. Justice Hannen explained the statutory ground for the decision to be the 63d section of the Lands Clauses Consolidation Act, which we have quoted above.

As we shall presently see, the effect of this construction, taken in connection with that given to other parts

(a) Duke of Buccleuch *v.* Metropolitan Bd. of Works, L. R. 5. H. L. 418. See especially the opinion of Hannen, J.

of the act, was to give the owner whose lands were taken complete compensation ; but to the owner of lands "injuriously affected," a more restricted measure of damages. As to this point, Hannen, J., said :(a)

"There is a manifest difference between the position of a person whose lands are taken and that of one whose lands are not. The former was possessed of something without which the proposed public purpose could not be accomplished ; he could have prevented the carrying out of the undertaking if he had not been deprived of his power by Act of Parliament, whereas the persons whose lands are not taken had no such power, and could not have hindered the appropriation of any lands not his own to any purpose not amounting to a nuisance. The Legislature has recognized this right of property, and the power growing out of it, as a fact, but has guarded against its abuse by compelling its possessor to avail himself of it only as means of obtaining a fair compensation for real damage."

§ 1102. **Damage caused by user.**—Notwithstanding the decision in the Duke of Buccleuch's case, the question of recovery for user, or for such consequential damages as are caused by the use of the powers conferred, after the construction of the works, does not seem to have been treated as entirely closed. Baron Bramwell, in The Duke of Buccleuch *v.* The Metropolitan Board of Works,(b) said : "It does seem strange that the taking of a piece of a man's land should let him in to prove all sorts of damage for which he could not otherwise recover," an expression of opinion with which Lord Chelmsford, in City of Glasgow U. Ry. Co. *v.* Hunter,(c) said he should feel disposed to agree ; and in this case it was held that the plaintiff could not recover for smoke or noise of trains. The Lord Chancellor said that the

(a) p. 445.
(b) L. R. 3 Ex. 306, 328.
(c) L. R. 2 Sc. App. 78, 82.

damages were merely "anticipated." Lord Chelmsford said that the claim did not "arise out of anything done on the land taken," but from the construction of a railway bridge over the land of another person, no connection existing between the front part of the respondent's premises, in respect to which compensation for damage has been given, and the back part over a small portion of which the railway was made, these different parts of the respondent's property not being otherwise connected than by their both being held under the same title. Lord Westbury, while reiterating his former objection to the rules laid down, thought that when land was taken in part, "the loss that will be sustained by the owner of that which is left, by the use intended to be made of that which is taken, the manner in which that use will bear on the occupation and enjoyment of that which is left, may be most legitimately considered," but for technical reasons found it impossible to sustain the recovery.

The whole question came up again in the House of Lords in 1889, in Essex *v.* Local Board for Acton.(a) On a proceeding to take part of appellant's lands for sewage works, it appeared that the works, even if conducted so as not to create an actionable nuisance, depreciated the market value of other lands of appellant which were considered as held with the first under the statute. Part of the land taken was let on long building leases; of the rest, part was in hand and part was let for short periods for brickmaking. The jury gave a verdict for the value of the land, and a further sum for damage present and prospective by reason of the injuriously affecting the other lands. It was held that the damage was not conjectural, because no nuisance might be

(a) 14 App. Cas. 153.

caused; and that the appellant was entitled to compensation caused not only by the construction of the works, but by their use. As to prospective damages from user, the Lord Chancellor thought the matter disposed of by the Duke of Buccleugh's case. Lord Watson said:

"I can discover no substantial distinction between the circumstances of this case and the facts which were before the House in Buccleuch *v.* Metropolitan Board of Works.(a) The prospective use, in respect of which compensation has been given, is confined to that portion of appellant's land which the respondents have acquired from him for statutory purposes; and the kind of depreciation which the jury had in view appears to me to be *ejusdem generis* with that arising from traffic upon a public thoroughfare. Neither the use of sewage works, nor such traffic, amounts in itself to a legal nuisance; but the existence of either may alter the character of land in the neighborhood and diminish its value in the market. When the erection of sewage works at once diminishes the value of the claimant's other lands to the extent of several thousand pounds sterling, I think he suffers substantial and not imaginary injury, although the depreciation may be due in great measure to an unreasonable antipathy to such works on the part of the purchasing or leasing public."

The only distinction of importance between this case and that of City of Glasgow U. Ry. Co. *v.* Hunter, appears to be that in the latter the claim did not arise out of anything done *on the land taken.* The result of the authorities would seem to be, therefore, that full consequential damages to the part not taken, arising from construction and user, both prospective as well as present, can be recovered whenever the works are constructed upon the part taken.

The decision in Essex *v.* Local Board for Acton (b)

(a) p. 166.

(b) 14 App. Cas. 153.

has been, as we have already seen,(a) severely criticised by the Master of the Rolls, in *In re* London, T. & S. Ry. Co. *and* Trustees of Gower's Walk Schools.(b) He quotes the remarks of the Lord Chancellor :(c) "Where part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of neighboring proprietors from whom nothing had been taken for the purpose of the intended works," and says that this seems to show that under the statute there may be an injurious affecting by something which would not be the subject of an action at common law. But though this is true, there is nothing in the judgment of the House of Lords to show that they thought they had in any way altered the rules of interpretation already established. In the case of lands "injuriously affected," the ordinary rule excluding non-actionable damage is applied. When land is partly taken a different rule applies.

§ 1103. **Benefits under the English statutes.**—The English statutes are silent on the subject of allowing benefits conferred on the landowner through a rise in the value of his property caused by the works to be taken into account. In Eagle *v.* Charing Cross Ry. Co.,(d) which was a case of damage to ancient lights, the umpire found that notwithstanding the diminution of light, the salable value of the plaintiff's interest in the premises was not diminished (the value of the property in the neighborhood generally having become greatly enhanced

(a) *Ubi supra*, § 1091, *n.* (a).
(b) 24 Q. B. Div. 326.
(c) 14 App. Cas. 161.
(d) L. R. 2 C. P. 638.

by the company's works). On this point Bovill, C. J., said :

"The amount of compensation the plaintiff is entitled to for the diminished light to his premises is not to be estimated with reference to what they will sell for. The plaintiff is not bound to sell. In the case of premises in a dilapidated state, the whole value is in the site. Is it to be said that therefore the owner is to recover nothing for an obstruction to his lights? I think the true test is whether damage has been sustained by reason of the works of the company."(a)

And in Senior *v.* Metropolitan Ry. Co.,(b) Wilde, B., said :

"I doubt whether in a case of compensation for injury to land a company can claim a set-off by reason of the land being subsequently benefited." (The case was one of temporary injury.) "It is obvious that where a railway passes through a neighborhood, wherever there is a station the adjacent premises may be greatly benefited. But if any individual happens to have a portion of his land taken, he is entitled to be paid the value of that land. If his land is injuriously affected, he is entitled to compensation for the injury. If the company were entitled to set off the benefit derived from the proximity to the station, one individual would be made to pay something for that, whereas his neighbor would pay nothing. It is the first time such an idea has been brought forward, and I see no reason for giving countenance to it."

§ 1104. **Avoidable consequences.**—The case of Queen *v.* Poulter (c) appears to have involved an unsuccessful attempt to invoke the rule of avoidable consequences in this class of cases. A railway company began to build warehouses which were to be when completed 100 feet high. The lessee of a warehouse the light of which would be affected by the completion of the buildings and who held

(a) p. 648.
(b) 2 H. & C. 258, 269.
(c) 20 Q. B. Div. 132, 136.

on a fourteen years' lease, terminable on six months' notice, required the company to determine whether they would take the lease, or whether he should give notice. The company declining to do anything, he gave notice. There was no evidence of injury at that time. He then claimed for the prospective higher rental made necessary by removal. The court held, however, that he was not entitled to such compensation. Lord Esher, M. R., said:

"I found my judgment on this, that it cannot be said that the giving of notice to put an end to the lease was the natural consequence of what the railway company had done or were about to do. Even supposing the railway company had already partially interfered with the lights, was it more than a free exercise of their will on the part of the claimants that they gave the notice to put an end to the lease? It was nothing but their own option to be exercised at their own will, with or without reason, and they gave the notice in exercise of that right."

Nothing is said in the case about the rule of avoidable consequences, but if the theory of reducing loss was the one on which the plaintiffs acted, they seem to have overlooked that deduction from the rule that the plaintiff need not *anticipate wrong*.[a]

§ 1105. The English rules of interpretation criticised.— The first judicial objection to the English rule which seems to have been taken is to be found in the exceedingly strong dissenting opinion of Lord Westbury in the case of Ricket *v.* Metropolitan Ry. Co.[b] The following extracts are necessary to show the scope of his opinion:

"It is material to observe that compensation under these statutes is given for damage resulting from lawful acts done by the companies in the exercise of their powers. Such acts are not injuries or grounds of action at law, although they may

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[a] See § 224.

[b] L. R. 2 H. L. 175, 202.

cause damage, and consequently give a right to compensation under the statute. When an act is done by a company in excess of its powers, or in a wanton and careless use of them, there is an injury for which the sufferer retains a remedy by an action at common law, or by suit in equity for an injunction; but things done by a company in the due execution of its powers are lawful, being duly authorized, and no action lies on account of them. When, therefore, the General Railway Acts use the term 'injuriously affected,' the word 'injuriously' does not mean 'wrongfully,' or 'unlawfully'; nor does it imply that compensation is limited to cases where the act done is such as but for the powers given would be a tort at common law. The words mean 'damnously affected' only; and the consequential right to compensation is the creature of the statutes, to be ascertained and measured by the positive language of the enactments, and not by analogy to actions of tort or trespass. There is nothing in the statutes to warrant the position that there shall be no compensation where at common law there would have been no right of action.

"In the 16th section of the Railways Clauses Act, two conditions are imposed upon companies respecting the exercise of their statutory powers. One is, that they shall do as little damage as can be; and the other, that they shall make full satisfaction to all parties interested for all damage by them sustained by reason of the exercise of such powers. In an early stage of the judicial exposition of statutes of this description, Lord Eldon decided that they must be treated as contracts between the companies and the Legislature. And this is no doubt the true principle by which they should be construed and applied. Liability to make compensation, therefore, is the contract of the companies with the Legislature; and the right of the parties interested, that is, the parties sustaining loss, results from that contract, and the enactments which give effect to it. If this view be correct, it follows that it is a mistake to lay down, as I find done in several cases, and in effect in the judgment of the four judges in this case, that the injury intended by the words 'injuriously affected,' must be one in respect of which, if there had been no statute enabling the company to do the act, an action would have lain for the injury at common law. Right to compensation is a title introduced by and dependent on the statutes; and it is only necessary to prove special damage to the occupant of the property

occasioned by the construction of the railway or its incidental works, and that the complainant is a party interested within the meaning of that phrase in the statute.

"I use the words 'special damage' or individual particular loss, because I entirely concur with the doctrine that compensation cannot be claimed by an individual for damage which is sustained in common by all the subjects of the realm. Thus, if a public highway be diverted, or crossed on a level, by a railway, the inconvenience of having to wait whilst trains pass is common to all the public; and the benefit which it is considered results to the public from the railway is the only compensation. Persons dwelling in the neighborhood may sustain this inconvenience more frequently than the rest of the public; but, if the inconvenience is to be regarded as compensated by the public convenience, it cannot be converted into a ground for compensation by reason of certain persons having to sustain the inconvenience more frequently than the rest of their fellow-subjects. I agree also with the distinction that has been taken between damage resulting from the railway when complete or from the act of making it, and damage occasioned by the proper (not negligent) user of the railway when made. No claim can be made for loss resulting from the due user of a railway. Many persons, such as the proprietors of stage-coaches, stage-wagons, and the owners of posting inns, may be ruined by the user of the railway by the public, but they have no claim to compensation. Compensation is given by the statute only to individuals who, in respect of the ownership or occupancy of lands or tenements, sustain loss in or through the construction of the railway, or the execution of the incidental works.

"This will appear on a short examination of the several enactments. By the 68th section of the Land Clauses Act, it is enacted that 'if any party shall be entitled to any compensation in respect of any lands, or of an interest therein, which shall have been taken for, or injuriously affected by, the execution of the works,' etc., 'such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit.' By the interpretation clause, the word 'lands' includes messuages, tenements, and hereditaments; and this enactment, therefore, treats the owner of any interest in a messuage, which is damaged or injuriously affected by the execution of the works of a railway, as entitled to compensation. It seems difficult to deny

that the occupier of a public house, the value of which depends on its custom, has his interest in that house materially damaged by loss of custom. It may always have been used as a public house, and as such has been let to the occupier, who takes it and pays a high rent for it as a public house. When he took it, its value was ascertained and the rent fixed by reference to the custom it had; and it seems in the highest degree unreasonable to strip the house of its character, and of the use and purpose for which it has been constructed, fitted, and employed; and, having so done, to say that the interest of the occupier has sustained no damage because the building or structure has not been deteriorated. A man gives a rent of £100 per annum for a public house with good custom, long established in some much-frequented thoroughfare, which house, if not used as a public house, would not be worth £50 per annum. Suppose, then, that the thoroughfare should be wholly or partially obstructed, and the custom of the house thereby diminished by one-half, is it consistent with common sense to say that the interest of the tenant in the house is not materially prejudiced? It is a fallacy, almost a mockery to answer, 'The custom is one thing, and the house another; and the injury is to the custom, not to the house.' You cannot sever the custom from the house itself, or from the interest of the occupier; for the custom is the thing appertaining to the house, which gives it its special character, and constitutes its value to the occupier, and for which he pays in the high rent he has agreed to give. If you diminish the custom of a public house, you diminish its value either to let or sell, and therefore you deteriorate the public house and the interest of the tenant therein.

"The true principle and the only rule is, that, in the inquiry whether the interest of the occupier of a messuage or building is damaged, that is, injuriously affected, you should estimate the value of the messuage or building to the occupier with reference to the use that he makes of it, and the beneficial purpose for which he has hired it and fitted it up, and for which he has paid and pays to the landlord a larger sum than the building *per se* would command; and if you find this use and enjoyment impaired by the works of the railway, you are bound to decide that the interest of the occupier is *pro tanto* damaged, that is, injuriously affected.

"It is clear that if the railway company, in the exercise of its

statutory power, took the public house entirely, it would have to pay for it according to its value as a public house, and the interest of the occupier therein would be estimated with reference to the value of the custom of the public house; but the same considerations by which the value of the entirety is estimated must apply, and be taken into account, when the question is, whether the value of the public house, during a certain period of time, has or has not been deteriorated. The trade or custom is a thing appertaining to the premises, and not to the person of the occupier; but all things appertaining to the premises are part of the premises, and included in the interest of the occupier, which word 'interest' is a large and comprehensive word. I adopt the observation of the Court of Exchequer: 'Loss of profits by loss of business is a loss to the good-will of the premises, and the good-will is part of the value of the property.'"

In Caledonian Ry. Co. *v.* Walker's Trustees,[a] Lord Selborne, L. C., speaking of the rule criticised by Lord Westbury, said: "If the point were open, I should myself think it questionable whether there was not a fallacy in such a test, depending upon the hypothesis of the same work being executed without authority, which (having regard to the nature and operation of acts for the execution of that class of public works) can hardly be supposed to have been within the contemplation of Parliament."[b]

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[a] 7 App. Cas. 259.
[b] p. 279.

CHAPTER XXXVI.

THE NATURE AND EXTENT OF THE LIABILITY FOR DAMAGES UNDER THE STATUTES OF EMINENT DOMAIN IN THE UNITED STATES.

§ 1106. Difference between English and American law.
1107. No compensation for damage outside the charter powers.
1108. Legislature may prescribe more favorable rule.
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1111. The real nature of the question.
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§ 1106. **Difference between English and American law.**—We have now examined the rules laid down by the English courts for the determination of the compensation to be awarded for lands taken or "injuriously affected" under the power of eminent domain. When we turn to the United States we find a much more complex condition of the law. The right of the legislature to take private property for public use is here exercised subject to the provisions of written constitutions, and in these again we find two different classes of provisions. The older constitutions provide generally that property shall not be "taken" without just compensation. On the other hand, in many of the States recent amendments have introduced

a principle similar to that of the English statutes, and provide for compensation whenever the property is damaged or injured. Of these States, again, some adopt the fundamental English canon of interpretation, others reject it altogether. In addition to these reasons for a want of harmony, the decisions of the courts upon the effect of the older constitutional provisions have in the progress of time introduced principles of construction so much more liberal than was at first considered proper, that in many cases the property-owner has a standing almost as well protected as in jurisdictions in which the organic law has been amended in his interest. It will be most convenient here to begin with a consideration of the early rules laid down on the subject.

§ 1107. No compensation for damage outside the charter powers.—As already explained, there is no more fundamental rule in all eminent domain cases than that compensation cannot be allowed in such proceedings for damage for improper construction, for negligence in construction, or for any acts outside the charter powers. The statute only contemplates such damage as flows from the execution of these powers. For everything else, the landowner's redress is either equitable or by an ordinary action at common law, for trespass, negligence, or for nuisance.([a]) This, as we have already seen, is the cardinal principle, which governs the whole subject. Whatever right of redress the property-owner may have under the provisions of law empowering the grantee of the fran-

([a]) King *v.* Iowa M. R.R. Co., 34 Ia. 458; Imler *v.* City of Springfield, 55 Mo. 119; McCormick *v.* Kansas City, St. J. & C. B. R.R Co., 57 Mo. 433; Allentown *v.* Kramer, 73 Pa. 406; Grand Rapids & I. R.R. Co. *v.* Heisel, 38 Mich. 62; Atchison & N. R.R. *v.* Garside, 10 Kas. 552; Fremont E. & M. V. R.R. Co. *v.* Whalen, 11 Neb. 585; Perley *v.* Railroad, 57 N. H. 212; Fore *v.* Western N. C. R.R. Co., 101 N. C. 526; and all the cases cited in § 1110.

chise to take his property, whenever an injury is done him by an act *outside* the charter powers, he can always recover as for a tort at common law. The measure of damages will, in general, be equal to the amount of injury done down to the time of action begun, for in such a case the act being entirely unlawful, there is no reason to treat it as continuous.[a] But in some cases the injury is regarded as permanent and the plaintiff recovers once for all.[b]

§ 1108. **Legislature may prescribe more favorable rule.**—The constitutional provision with reference to taking private property for public use fixes a limit below which the legislature cannot go. But as the legislature may annex such conditions as it pleases to the grant of a franchise, we frequently find in statutes a rule of damages more favorable to the land-owner than that of the constitution.[c] As a general thing it will be found that these statutes enlarge the measure of redress, by directing compensation to be paid for all damage done without regard to whether property is taken or not.

§ 1109. **Consequential damages—Term misused.**—It is important to notice at the outset the peculiar meaning which in the United States the term "consequential damages" has acquired in this class of cases. Properly, consequential damage is such as is not direct, while, as we have noticed elsewhere, the term is sometimes used to

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[a] Florida Southern R.R. Co. *v.* Brown, 23 Fla. 104; and so where there has been an assessment of damages, and a railroad company makes an unlawful use of its right of way, the owner will be entitled to new damages, for compensation for such acts cannot have been included in the original assessment: Porterfield *v.* Bond, (Miss.), 38 F. R. 391.

[b] Troy *v.* Cheshire R.R. Co., 23 N. H. 83; Fowle *v.* New Haven & N. Co., 107 Mass. 352; 112 Mass. 334; Wells *v.* New Haven & N. Co., 151 Mass. 46; Denver City I. & W. Co. *v.* Middaugh, 12 Col. 434.

[c] Lycoming Gas & Water Co. *v.* Mayor, 99 Pa. 615; Heyneman *v.* Blake, 19 Cal. 579, 584, 585.

denote such damages as, notwithstanding their indirect character, *may* be recovered (as, for instance, under the rule in Hadley *v.* Baxendale), and sometimes such as owing to this character may not under any circumstances be recovered. In cases arising under statutes of eminent domain, however, the term is used in a very restricted and peculiar sense which derives its force (though it does not derive its origin) from treating all damages attributable to the "taking" of property as direct, and all others as consequential. And so, when no land is taken, and there is no legal injury, such damage as comes from the mere exercise of public powers by public agents or by grantees of franchise, as in grading a street, is called consequential. The origin of this misuse of the term is to be traced to the early English cases which treated acts of public officers and others for which no action would lie as producing "consequential" damages, but there is nothing in the decisions under the Land Clauses Consolidation Act to show that the English judges have ever had occasion to consider such damages as indirect. And indeed, looking solely at the invasion of the land-owner's rights there is nothing less direct about them than the damages he suffers in other respects. Whether land is taken, or whether the value of premises abutting on a railroad is impaired by the operation of the road, or whether a lot is diminished in value by cutting down a grade, the loss is the direct result of the exercise of the power of eminent domain. The only case in which damages coming from the user of the powers granted can be treated as "consequential" is when they are "consequential" to a "taking," which in the early American cases was treated as the trespass against which the constitutional safeguard was provided. The theory of these cases seems to have been this: in the absence

of a constitutional provision, the land-owner is without remedy of any kind. The constitution provides that for property "taken" just compensation shall be given. The just compensation, then, must be for the expropriation; but the use to which the property after it is taken is put is no concern of the owner. The State might take it for any purpose. It may use its own land for any purpose; may convert it into a park on the one hand, or erect a prison or an almshouse on it on the other. It has the same right as any proprietor. Consequently to see what "just compensation" means we must look solely to the "taking," not to the use to which the property is put. But here again we must note a distinction. The "taking" is not merely a diminution of the property by the value of the part taken; the taking *affects* the residue, the part not taken. It leaves it in a different shape, perhaps divides one part from the other so as to make each less capable of advantageous use than before, and this injury to the remainder is a *direct* consequence of the taking. It is when we go beyond these limits and look at the damages to the property which will arise from the *operation* of the railroad, canal, etc., that we get into the field of what, in this view, is here called consequential damages. And as we proceed in our inquiry we shall find that our courts, beginning with the rigid rule that such damages are to be excluded, have become more and more influenced by the consideration that it was only by a highly technical and narrow principle of interpretation that the rule had ever been introduced, and are constantly showing a stronger and stronger disposition to abandon it. In the case where no property at all is taken and no redress allowed (as where the grade of a street is changed) the term "consequential damages" is out of place. Whenever redress is given (as under the

new constitutions and under particular statutes) there is a real question of consequential damages, for damages must here be distinguished into two classes, those which can, and those which cannot be allowed. When redress is not given, it is a case of *damnum absque injuriâ*, for where no action will lie, there is no question of damages, either consequential or otherwise.

§ 1110. **General rule.**—* The general rule is, that where, in the absence of any constitutional or statutory provision, the grantees or agents have not exceeded the power conferred on them, and when they are not chargeable with want of due care, no claim can be maintained for any damage resulting from their acts; *actus legis nemini est damnosus.*

Otherwise, it is said, the absurdity would follow that operations undertaken and conducted by virtue of the supreme authority, are unauthorized in the view of the law, and lay a foundation for damages. The proper light in which to regard the matter is to consider the grantee of the franchise, or the public agent, so long as he does not transcend the authority conferred on him, as representing the government, and the government as acting under its right of eminent domain, subject, of course, to the duty to provide compensation, where that duty is imposed by the Constitution, and to that only.[1] And

[1] So, formerly, in Pennsylvania, neither the State nor a person, artificial or natural, acting by its authority under a law which the legislature is competent to make, was answerable for consequential damages occasioned by the construction of a highway any further than was specially provided by the law itself. Henry *v.* Pittsburgh & A. Bridge Co., 8 Watts & Serg. 85. See also Callender *v.* Marsh, 1 Pick. 418, 430; Boston & Roxbury Mill Dam Corp. *v.* Newman, 12 Pick. 467; The Boston Water Power Co. *v.* The Boston & Worcester R.R. Co., 16 Pick. 512, and s. c. 23 Pick. 360; Gov. & Co. of the British C. P. Manufactory *v.* Meredith, 4 T. R. 794; Sutton *v.* Clark, 6 Taunt. 29; Wardens & Commonalty of the Mystery of Grocers *v.* Donne, 3 Scott 356; Bolton *v.* Crowther, 4 D. & R. 195; The King *v.* Commissioners of Sewers, 8 B. & C., 355; The Queen *v.* Eastern Counties Ry. Co., 1 Gale & Davison 589; Lehigh Bridge Co. *v.* Lehigh Coal & Navigation Co., 4 Rawle 9; Lansing *v.* Smith, 8 Cowen 146; Steele *v.* Presi-

the protection is extended not merely to the immediate grantees of the franchise, or the immediate agents of the government, but to the sub-agents or inferior employees who are acting under the same general authority. The loss sustained in all such cases is *damnum absque injuriâ*.(a)

So in New York, where, in grading a street, the ground was cut down so as to injure an adjacent proprietor, but none of his land was actually taken, it was declared that the loss was *damnum absque injuriâ;* that the constitution had made no mention of indirect or consequential damages; and that, although the proprietor had actually suffered injury, still it could not be said that property had been "taken for public use,"[1] within the meaning of the constitution.**

§ 1111. **The real nature of the question.**—In New Hampshire the question here discussed has been consid-

dent, etc., of Western Inland Lock Navigation, 2 Johns. 283; Livingston *v.* Adams, 8 Cowen 175; Jermaine *v.* Waggoner, 1 Hill 279; and Waggoner *v.* Jermaine, s. c. in error, 7 Hill 357; Graves *v.* Otis, 2 Hill 466. Any inconvenience or damage suffered in consequence of the proper and reasonable repairs of a public highway by a plank-road corporation, in the legitimate exercise of the powers conferred by the statute, is *damnum absque injuriâ*, and no action lies. Benedict *v.* Goit, 3 Barb. 459; Bord. & So. Amboy T. Co. *v.* The Camden & Amboy R.R. Co., 2 Harr. (N. J.) 314; Hollister *v.* Union Co., 9 Conn. 436; Burroughs *v.* Housatonic R.R. Co., 15 Conn. 124. The cases are not in perfect accord with each other, but they sustain substantially the doctrine in the text. See also a very clear and satisfactory exposition of the subject in the American Law Magazine, April, 1843, p. 52, from which many of these authorities are taken. The whole subject was examined in Radcliff's Ex'rs *v.* Mayor of Brooklyn, 4 Comst. 195. The doctrine of the text was affirmed, and it was held that persons acting under an authority conferred by the legislature, to grade, level, and improve streets and highways, if they exercise proper care and skill, are not answerable for the consequential damages which may be sustained by those who own land bounded by the street or highway. See in Hatch *v.* Vermont Central R.R. Co., 25 Vt. 49, a very full and able opinion by C. J. Redfield on this subject. But in New Jersey, see Delaware & Raritan Co. *v.* Lee, 2 Zabriskie 243, where a canal company was held liable for damage done land flooded by the work.

[1] Radcliff's Ex'rs *v.* Mayor of Brooklyn, 4 Comst. 195.

(a) Macy *v.* City of Indianapolis, 17 Ind. 267; Wilson *v.* The Mayor, 1 Denio 595; Richardson *v.* Vermont R.R. Co., 25 Vt. 465; Gould *v.* Hudson River Co., 6 N. Y. 522.

ered at length. In Thompson *v.* Androscoggin R. I. Co.(a) it was said that where a corporation is authorized by statute to do certain acts, it should exercise due care in the performance of those acts, and show due consideration for the interests of others, and that if it does not use due care it will be liable for the injurious consequences, although its acts were authorized by statute. The question of due care is of course for the jury. Doe, J., said :

"Much that is said in the books concerning the remoteness and consequentialness of damage caused by a person acting under legislative authority, is a dark and circumlocutory statement of the question, whether the use of land by which the damage was caused would have been a reasonable use for the owner of the land to make of it, unauthorized by the legislature, and disturbing no public right ; whether it would have been an exercise of his right of property, which right has been taken from him by the public power of eminent domain, and, being thus taken by the public and appropriated to its own use, may be rightfully exercised by a duly authorized public agent" (p. 553).

He quoted, as to this, Eaton *v.* Boston, C. & M. R.R.,(b) and continued :

"The power conferred (under eminent domain) is to do something with ordinary care, because the right to do that thing with ordinary care was somebody's right of property which has been taken from him by a compulsory purchase, and appropriated to a public use ; the right, after it was bought, remained in its legal sense what it was before. The public agents (whether called public agents or grantees of a public franchise) are not liable for any damage resulting from their acts, if they do not exceed the power or transcend the authority conferred on them. Otherwise the absurdity would follow, that power is not power, and authority is not authority. In Eaton *v.* Railroad, the public (by their agents the defendants) took from R., and converted to

(a) 54 N. H. 545.
(b) 51 N. H. 504.

its own use, R.'s right to make a reasonable use of his own land—that is, a right to make such a use of his land as it would be reasonable for him to make without compensating Eaton or any one else for any damage resulting therefrom. In making such a use of R.'s land the defendants would not transcend the authority conferred upon them. But in making an unreasonable use of R.'s land as against Eaton, and thereby causing Eaton's land to be injured, they took Eaton's property without compensation, and transcended their authority. The power of eminent domain could neither take from R. a right (to make such a use of his land) which he never possessed, nor take from Eaton, without compensation, his proprietary right to be unharmed by such a use of R.'s land. Thus interpreted and applied, the rule fairly stated by Sedgwick, as the result of the adjudicated cases, is intelligible and sound. It is generally called a rule of consequential damages, and it may safely be called so if sufficient pains be taken to give such an explanation of its operation and effect as will show how unmeaning and inappropriate the name is. If the railroad company, by changing the course of traffic and travel, and causing a village to be built on R.'s land, had reduced the value of Eaton's property in a neighboring village more than the entire worth of his farm, they would not have been liable to him for that damage. They would have been justified, not on the ground that the damage was remote and consequential, in the sense of being a remote consequence, but on the ground that a railroad, changing the channels of commerce and causing a rival village to spring up, would be a reasonable use for others to make of their land, an exercise of their rights of property in land, and not a violation of Eaton's rights. The idea sometimes conveyed, in such a case, by the supposed doctrine of remote and consequential damage, is, that although the sufferer's legal right is violated, the damage is too remotely consequential, too remote in degree, to be actionable; as if the law would not give redress for the violation of a legal right when the space between cause and effect exceeds a certain prescribed legal distance. A proprietor's right may be more seriously infringed by a cut through the bank of a river, at a great distance from his land, than by a railway built across his hearthstone. One of Eaton's proprietary rights was the correlative of R.'s duty of abstaining from such a use of air and water, and from such an interference with their quality and circulation as

would be unreasonable and injurious to the enjoyment of Eaton's farm. The same principle governs the ownership and use of land and all material things. Whether we say that R. had a right to make a reasonable use of his land, and thereby cause a damage to Eaton, or that he had not a right, by an unreasonable use of his land, to injure Eaton, or that Eaton had a right not to be injured by R.'s unreasonable use of his own land, we mean the same thing. The principle may be expressed in an affirmative or a negative form, in a statement of rights or a statement of duties. Calling it a rule of consequential damages, or treating it under that head, tends to envelope a very plain matter in unnecessary obscurity."

§ 1112. **The rule of general application.**—It is unnecessary to multiply cases to show that this rule is generally followed. The distinction runs through all the American cases that for acts necessary and proper to the execution of the grant, short of an actual "taking," the grantee, or the public agent, is not responsible; for negligence in the exercise of his powers he is responsible. Such will be found to be law alike in jurisdictions holding that physical interference is necessary to constitute a "taking," and in those in which an interference with incorporeal hereditaments is treated in certain cases as a "taking." So a party obstructing a stream by a railway built pursuant to legislative authority and thereby causing the lands of the adjacent proprietors to be overflowed, is liable only for so much of the injury as results from not providing necessary safeguards.(a) So in Kavanagh *v.* City of Brooklyn (b) the same principle was applied to damage done by municipal corporations in making improvements authorized by law. In Jackson *v.* Portland (c) it was held improper, in proceedings to assess damages

(a) Bellinger *v.* New York C. R. Co., 23 N. Y. 42.
(b) 38 Barb. 232.
(c) 63 Maine 55.

for the location of a sewer, to include damages for a deposit of filth, etc., on the plaintiff's dock in the past, and also a sum annually till a cesspool should be created. Damages should, it was said, be assessed on the supposition that the sewer would be properly constructed. If it were not properly constructed, the plaintiff could receive compensation in a common-law action for improper construction.([a])

The authorities of towns and cities, for example, have full power to lay out, open, grade, regrade, level, pave, or gravel streets or alleys, to establish sewers and drains, culverts and embankments, wherever such improvements are necessary; and where the work is done with proper care and skill, and without malice, the town or city is not liable for any consequential damage that may result. The general principle steadily maintained is, that in the absence of special statutory or constitutional provisions,

([a]) See, further, Hosher *v.* K. C., St. J. & C. B. R.R. Co., 60 Mo. 329; Perley *v.* Railroad, 57 N. H. 212; Morris & Essex R.R. Co. *v.* State, 36 N. J. 553; Fowle *v.* New Haven & N. Co., 112 Mass. 334; City of Vincennes *v.* Richards, 23 Ind. 381; Bennett *v.* City of New Orleans, 14 La. Ann. 120; Douglass *v.* Boonsborough Turnpike R. Co., 22 Md. 219; Monongahela Bridge Co. *v.* Kirk, 46 Penn. 112; Clarke *v.* The Birmingham and Pittsburgh Bridge Co., 41 Penn. 147. But in the case of Tinsman *v.* Belvidere Delaware R.R. Co., 2 Dutch. 148, the Supreme Court of New Jersey, while admitting the weight of authority in favor of the doctrine of the text, declares it not to be the law of that State. So far as the rule applies to public agents of the government, the learned court does not question it, but insists that to maintain that corporations holding grants of public franchises, possess sovereign immunity against liability for damages, leads to the unjust rule that no redress can be had for damages resulting from their acts. In answer to the argument that it would be absurd that an act authorized by law should lay a foundation for damages, the court say: "Where is the absurdity in supposing that the legislature intended, by virtue of their sovereign power, to confer upon the corporation authority to take the land necessary to construct the road, to do precisely what they might have done if they had owned the land necessary for that purpose, leaving their common-law liability precisely where it would have stood if the work had been constructed upon the lands of the corporation without the aid of the statute?"

a municipal corporation is not liable for injury to private property, where the act complained of is done under authority of law, if there be no negligence, and if no property be taken.(a)

§ 1113. Nature of the right of eminent domain.—That, in the absence of constitutional restriction private property may be taken by the State for public improvements without compensation, has been said to follow from the nature of the sovereign power of the State, and to have been the doctrine of the common law.(b) But there is great weight of authority to the effect that even in the absence of constitutional provisions compensation must be made, at least when property is absolutely taken.(c) In the United States, the exercise of this power by the legislatures has been limited by the constitutions of almost all the States, which provide, in general, that private property cannot be taken for public use without just compensation. The Fifth Amendment to the Constitution of the United States contains a provision similar to the one above referred to, but is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the States.(d) There would seem to be no exemption as to the kind of property which may be taken, in the

(a) City of Delphi *v.* Evans, 36 Ind. 90, 96; Mayor, etc., of Cumberland *v.* Willison, 50 Md. 138; Kehrer *v.* Richmond City, 81 Va. 745; Smith *v.* Alexandria, 33 Gratt. 208; Transportation Co. *v.* Chicago, 99 U. S. 635; Smith *v.* Corp. of Washington, 20 How. 135; Callender *v.* Marsh, 1 Pick. 418; 2 Dill. Mun. Corp., § 987 *et seq.*; O'Connor *v.* Pittsburg, 18 Pa. 187, and cases cited.

(b) Governor, etc., of B. C. P. Mfrs. *v.* Meredith, 4 T. R. 794; The State *v.* Dawson, 3 Hill S. C. 99.

(c) Sinnickson *v.* Johnson, 2 Harr. N. J. 129; Gardner *v.* Newburgh, 2 Johns. Ch. 162; Pumpelly *v.* Green Bay Co., 13 Wall. 166, 178.

(d) Barron *v.* The Mayor of Baltimore, 7 Pet. 243; Withers *v.* Buckley, 20 How. 84.

exercise of this right of eminent domain, when it is needed for public purposes. In Wells *v.* Somerset & K. R.R. Co.,([a]) it was held that buildings might be so taken, and in Jerome *v.* Ross,([b]) that materials for the construction of a canal might be appropriated under an act authorizing the commissioners to enter upon and use any lands necessary for the prosecution of the improvements intended by the act; and in Watkins *v.* Walker Co.,([c]) that timber might be taken for the repair of a highway, and in Gardner *v.* Newburgh ([d]) that a stream of water might be diverted from the owner's land; and in Crosby *v.* Hanover ([e]) it is said that a franchise or easement of any corporation, however exclusive the grant, may be taken for public use, provided suitable compensation be made. In The People *v.* The Mayor, etc.,([f]) Hogeboom, J., said: "It is to be observed that, neither as regards municipal cerporations nor private persons, is the right of property strictly absolute and intangible. Property is subject to be taken under the right of eminent domain. It is subject to taxation by the public authorities. And when it is in this way required for public purposes, the right of the property-holder must yield to the paramount right of the public. Title to property is always held upon the implied condition that it must be surrendered to the government, either in whole or in part, when the public necessities, evidenced according to the established forms of law, demand." And upon this doctrine the reasoning, in the cases which have arisen under the exercise of the power of eminent domain, proceeds.

([a]) 47 Me. 345.
([b]) 7 Johns. Ch. 315.
([c]) 18 Tex. 585.
([d]) 2 Johns. Ch. 162.
([e]) 36 N. H. 404.
([f]) 32 Barb. 102, 112.

§ 1114. **What is a "taking" of property.**—The question underlying the whole subject of the measure of damages under statutes of eminent domain is one of interpretation. The two words upon which the question hinges are "take" and "property." And here we find that the canons of interpretation applied have been by no means uniform. In the earlier cases it seems to have been assumed that there were only two possible cases: one in which either the fee simple was taken, or else the entire beneficial enjoyment of it (as in the case of a right of way taken for a railroad, where nothing remained in the owner but a bare possibility of reverter), and the other, in which the property was injured, or "consequentially" damaged. Later decisions treat any damage to property, by actual physical interference, which destroys the beneficial use, as "taking"; while a third class of cases, of which those arising under the Elevated Railroad statutes in New York are the most important, treat interference with the beneficial use of property by infringement of incorporeal easements attached thereto (as of light, air, and access) as a taking *pro tanto*. The older methods of interpretation, moreover, have not, as in so many other cases, given way to the later, so that the second has supplanted the first, and the third the second, but all three exist side by side, not only in different jurisdictions, but even in the same jurisdiction as applied to different subjects. It will be advantageous first to state the early rule, and then trace the process by which it has been modified.

§ 1115. **Early rule.**—As to the scope and meaning of the word "taken" the weight of authority would seem to be, as already stated, that it covers only the property which is actually taken for the public use, and does not cover injuries to adjacent property, however grievous they may be. The leading case in the United States upon

this point is that of Radcliffe's Ex'rs, etc. *v.* The Mayor, etc., of Brooklyn.(a) Here a street lying west of and adjoining the testator's premises, had been laid out prior to the digging of which the plaintiffs complained; but it had not been opened or used as a highway. The digging was done in the site of the street, for the purpose of grading and levelling it for public use. There was no excavation or any other act done by the defendants in or upon the testator's land. But, in consequence of the digging away the bank in the site of the street, which was a natural support of the testator's land, a portion of his premises fell into the street and he suffered damage. Here the court, *per* Bronson, J., says (p. 198):

"There is no charge that the defendants acted maliciously, nor do the pleadings impute to them any want of skill or care in doing the work. The defendants are a public corporation, and the act in question was done for the benefit of the public and under ample authority, if the legislature had power to grant the authority, without providing for the payment of such consequential damages as have fallen upon the testator. . . . . Although the testator's property has suffered damages, I find no precedent for saying that it has been 'taken for public use' within the meaning of the Constitution. This short view is enough, perhaps, to dispose of the case. But the wide range of discussion at the bar makes it proper to consider the matter more at large. As no question has been made on that subject, we must assume that the defendants had acquired the title to the lands in the site of the street in the forms prescribed by law. In levelling and grading the street, they were at work in their own land, doing a lawful act for a lawful purpose. They did not touch the testator's property, and the question is, whether the damage which resulted to him, in consequence of grading the street, must not be regarded as *damnum absque injuriâ*."

After an extensive examination of the cases bearing on this point, the learned judge continued (pp. 203, 207):

(a) 4 Comst. 195.

"The case before us seems to fall within the principle that a man may enjoy his land in the way such property is usually enjoyed, without being answerable for the indirect or consequential damages which may be sustained by an adjoining land-owner. . . . . In some instances the land-owner will suffer a heavy loss, and this case may perhaps be one of the number, but it is *damnum absque injuriâ*, and the owner must bear it."

In O'Connor *v.* Pittsburgh,[a] Gibson, C. J., said: "The constitutional provision for the case of private property taken for public use, extends not to the case of property injured or destroyed"; and in Curlman *v.* Smith,[b] where the facts called for a construction of the constitutional provision before alluded to, the court said (p. 258):

"The provision was not designed and it cannot operate to prevent legislation which should authorize acts operating directly and injuriously as well as indirectly upon private property, when no attempt is made to appropriate it to public use. . . . . The design appears to have been simply to declare that private property shall not be changed to public property, or transferred from the owner to others for public use without compensation; to prevent the personal property of individuals from being consumed or destroyed for public use without compensation, not to protect such property from all injury by the construction of public improvements."

Referring to the signification of the word "taken" the court continued (p. 259):

"It cannot well be denied, and it is generally admitted to have been used in constitutions containing this clause, to require compensation to be made for private property appropriated to public use by the exercise on the part of the government of its superior title to all property required by the necessities of the people, to promote their common welfare. This appears to have been denominated the right of eminent domain, of super-eminent dominion or transcendental propriety. These terms are of

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[a] 18 Pa. 187.
[b] 34 Me. 247.

importance only to disclose the idea presented by them, that the right to appropriate private property to public use, rests upon the position that the government or sovereignty claims it by virtue of a title superior to the title of the individual, and that, by its exercise, the individual and inferior title becomes wholly or in part extinguished ; extinguished to the extent to which the superior title is exercised. To take the real estate of an individual for public use, is to deprive him of his title to it or some part of his title, so that the entire dominion over it no longer remains with him. He can no longer convey the entire title and dominion."

The doctrine as laid down above will be found generally adhered to.(a)

§ 1116. **Second rule—Physical interference destroying beneficial use.**—The leading case holding that any physical interference destroying the beneficial use of the property is Pumpelly *v.* Green Bay Co.(b) In that case it was held by the Supreme Court of the United States that the backing of water so as to overflow the land of a proprietor, or any other superinduced addition of water, earth, sand, or other material or artificial structure placed on land, if done under statutes authorizing it for the public benefit, was a taking of property within the meaning of the constitutional prohibition. The court said as to this :

(a) Albany Northern R.R. Co. *v.* Lansing, 16 Barb. 68 ; Canandaigua & Niagara Falls R.R. Co. *v.* Payne, Ib. 273 ; Gould *v.* Hudson R.R. Co., 12 Barb. 616 ; Troy & Boston R.R. Co. *v.* Northern Turnpike Co., 16 Barb. 100 ; Hatch *v.* Vt. Central R.R. Co., 25 Vt. 49 ; Rounds *v.* Mumford, 2 R. I. 154 ; Richardson *v.* Vt. Central R.R. Co., 25 Vt. 465 ; Plant *v.* L. I. R.R., 10 Barb. 26 ; Macy *v.* Indianapolis, 17 Ind. 267 ; Crawford *v.* Delaware, 7 Ohio St. 459 ; New Albany, etc., R.R. Co. *v.* O'Dailey, 13 Ind. 353 ; Rochette *v.* Chicago, M. & St. P. Ry. Co., 32 Minn. 201 ; Heiss *v.* Milwaukee & L. W. R.R. Co., 69 Wis. 555 ; Struthers *v.* Dunkirk, W. & P. R.R. Co., 87 Pa. 282 ; Livermore *v.* Jamaica, 23 Vt. 361 ; Chicago *v.* Taylor, 125 U. S. 113 ; Greene *v.* California, 73 Cal. 29 ; Weis *v.* Madison, 75 Ind. 241 ; Bordentown & S. A. T. Co. *v.* Camden & Amboy R.R. Co., 2 Har. 314 ; Parrot *v.* Cincinnati, H. & D. R.R. Co. 10 Oh. St. 624.

(b) 13 Wall. 166.

"It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the powers of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the law or practices of our ancestors. . . . . We are of the opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction, ... and in some cases beyond it, and that it remains true, that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution; and this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle."

The rule laid down in this case was subsequently limited by the Supreme Court to cases where there was a "physical invasion" of the real estate and a "practical ouster of his possession."[a]

The defendant in grading a street obstructed a watercourse so as to flood plaintiff's land. It was held that this was a "taking" of the property under the old California Constitution.[b] In Maryland the Court of Appeals ap-

[a] Transportation Co. *v.* Chicago, 99 U. S. 635; *acc.* Arimond *v.* Green Bay & Miss. C. Co., 31 Wis. 316.

[b] Conniff *v.* San Francisco, 67 Cal. 45.

pear to have adopted the view that any physical injury to the property amounts to a "taking." A railroad tunnelled under a street, injuring the support of the corner property, and through this the adjoining house; it was held that this was not *damnum absque injuriâ*, but a taking of property, which must be paid for.(a) The court restricts the rule to private corporations, and says that against a municipal corporation, in the proper exercise of its authority over streets, there could be no recovery. But if the principle be admitted that such injuries amount to a taking, it is difficult to understand the grounds of the distinction.

§ 1117. **Third rule—Any injury a taking of property.**—In these cases the only term discussed has been the "taking"; it appears to have been assumed that there was no doubt as to the meaning of "property." The first case in which any question on this head was raised seems to have been that of Eaton *v.* Boston, Concord & Montreal R.R. Co.,(b) in which the facts presented were as follows: The corporation, claiming to act under legislative authority, removed a natural barrier situated north of the plaintiff's land, which had, down to the period of the construction of the road, completely protected his meadow-land from the effects of floods and freshets in a neighboring river. In consequence of this, the waters of the river sometimes flowed over his meadows, carrying stones, sand, and gravel upon them. Here there was nothing but injury, and no appropriation of land whatever. Nevertheless, the court held that this was a taking of the plaintiff's property, within the meaning of the constitutional provision, and that the legislature could not authorize any such injury without making provision

(a) Balto. & Potomac R.R. Co. *v.* Reany, 42 Md. 117.
(b) 51 N. H. 504.

for compensation. In reaching this conclusion, the court first states the commonly accepted interpretation as follows:

"The constitutional prohibition (which exists in most, or all, of the States) has received in some quarters a construction which renders it of comparatively little worth, being interpreted much as if it read, 'No person shall be divested of the formal title to property without compensation, but he may without compensation be deprived of all that makes the title valuable.' To constitute a 'taking of the property' it seems to have sometimes been held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' an absolute or total conversion of the entire property, 'a taking the property altogether.' These views seem to be founded on a misconception of the term 'property,' as used in the various State constitutions."

In a strict legal sense, the opinion continues, land is not "property," but the subject of property. The term property, although in common parlance frequently applied to a tract of land or a chattel, in its legal signification means only the rights of the owner in relation to it. Property is, in other words, the right to possess, use, enjoy, dispose of, rent, sell, give away, devise the thing owned; and anything which interferes with the beneficial enjoyment of all these rights substantially diminishes them, and consequently involves a "taking," *pro tanto*, of the property. The right of using indefinitely is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. This right of using necessarily includes the right and power of excluding others from using the land. If the right of indefinite use is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes "property," although the owner may still have left him valuable rights of a

more limited and circumscribed nature. He has not the same property that he formerly had. Then he had an unlimited right, now he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A.'s unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A. than to take from him the title in fee simple to an acre, leaving him the unrestricted right of using the remaining ninety-nine acres. After using the language we have quoted, the court says:

"If, on the other hand, the land itself be regarded as 'property,' the practical result is the same. The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the constitution intended to protect rights which are worth protecting—not mere empty titles or barren insignia of ownership, which are of no substantial value. If the land, 'in its corporeal substance and entity,' is 'property,' still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make 'property' valuable. Among these elements is fundamentally the right of user, including, of course, the corresponding right of excluding others from the use. . . . . A physical interference with the land, which substantially abridges this right, takes the owner's 'property' to just so great an extent as he is thereby deprived of this right. To deprive one of the use of his land is depriving him of his land; for, as Lord Coke said: 'What is the land but the profits thereof?' . . . . The private injury is thereby as completely effected as if the land itself was 'physically taken away.'"

As a matter of fact, the land itself is never taken. The land, the corporeal substance, always remains. The possession may be taken, or the entire title, or both, or something less; and in any one of these cases the only

"taking" that is possible is a diminution of the right of user.(a)

§ 1118. **Rules under new constitutions.**—The hardship inflicted by the old rule, that any damage or injury outside the taking was *damnum absque injuriâ*, has led in many States to the adoption of new constitutional provisions, which require that compensation shall be made not only for property taken, but for property "damaged" or "injured."(b) The terms used are substantially equiv-

(a) Compare the language of Austin, who, noting the confusion between the meaning of property in a sense equivalent to that of the Roman *dominium* or *proprietas*, and the "loose and vulgar acceptation" to denote "not the right of property or dominion, but the subject of such a right, as where a horse or piece of land is called my property," says: "The right of property or dominion (in so far as the right of user is concerned) is resolvable into two elements: First, the power of using indefinitely the subject of the right. . . . . Secondly, a power of excluding others (a power which is also indefinite) from using the same subject. For a power of indefinite user would be utterly nugatory, unless it were coupled with a corresponding power of excluding others generally from any participation in the use. The power of user and the power of exclusion are equally rights to *forbearances* on the part of other persons generally. By virtue of the right or power of indefinitely using the subject, other persons generally are bound to forbear from disturbing the owner in acts of user. By virtue of the right or power of excluding other persons generally, other persons generally are bound to forbear from using or meddling with the subject. The rights of user and exclusion are so blended, that an offense against the one is commonly an offense against the other. I can hardly prevent you from plowing your field, or from raising a building upon it, without committing, at the same time, a trespass. And an attempt on my part to use the subject (as an attempt, for example, to fish in your pond) is an interference with your right of user as well as with your right of exclusion." Austin on Jurisprudence, 4th ed., 818, 836.

(b) In Nebraska it has been expressly held that the words "or damaged" in Sec. 21, Art. I, of the constitution of 1875, were inserted in order to give a remedy in a class of cases not embraced by the former provision relating to property taken, and not to curtail or restrict any right which previously existed; the old rule that for damages for negligent or improper construction a common-law action will lie is not affected by it. Omaha & R. V. R.R. Co. *v.* Standen, 22 Neb. 343. So in other States. Rigney *v.* Chicago, 102 Ill. 64, 75; City of Atlanta *v.* Green, 67 Ga. 386; Reardon *v.* San Francisco, 66 Cal. 492.

alent to the "injuriously affected" of the English statutes, and the question arises whether the English principles of interpretation are to govern. The theory which underlies the construction put by the English judges on the Lands Clauses Consolidation Act and similar statutes is in reality the same which lies behind the American decisions—that the corporation condemning or taking the land stands in the shoes of the original owner, and is not responsible for acts of user producing damage to property of adjoining owners when *he* would not have been responsible. From this the conclusion was drawn in England that "injuriously" affected meant affected by some act importing *injuria* as between a land-owner and his neighbor; in both countries the principle was recognized that damage done in the exercise of statutory powers was *damnum absque injuriâ*. Now that we have constitutions incorporating the terms used in the English statutes, it has been argued that they are to be taken subject to the English principles of construction.

§ 1119. **Massachusetts.**—Massachusetts is one of the States retaining the old provision; but the same question has there arisen upon the interpretation of the statutes, which generally have extended the land-owner's redress to all cases of injury. In Trowbridge *v.* Brookline,[a] the statute made the respondent liable generally for "damages occasioned by the laying out, making, and maintaining" a sewer. Under this and similar provisions it is held in Massachusetts that damages can be recovered for injuring land not taken and not abutting on land taken.[b] And it is held by the Supreme Court that

[a] 144 Mass. 139.

[b] Dodge *v.* County Commrs., 3 Met. 380; Parker *v.* Boston & Me. R.R., 3 Cush. 107; Marsden *v.* Cambridge, 114 Mass. 490.

under such a provision where a town lawfully took land and constructed a common sewer therein, whereby a well upon land not taken and not adjoining land taken is made dry, the well being fed by water percolating through the soil, it must respond in damages to the owner of the well.(a) Allen, J., said :

"The respondent contends that it had the right of an owner of the land taken to make excavations in it, and thereby drain its neighbor's well ; that its act, without the authority and protection of the statute, was lawful, and invaded no right of the petitioner, and gave her no right of action ; and that, in accordance with the decisions in England, the statute should be construed to intend only damages which, but for the protection of the statute, could be recovered by action. But the respondent does not stand, in this respect, in the position of a purchaser of the land, taking the rights of its grantor. It is not the absolute owner of the land, but it took and holds the right to occupy the land for certain purposes, and to do upon it certain acts authorized by the statute. In exercising its rights, the town acts, not under the title of the owner, but by virtue of the authority given by the statute, and under the obligation imposed by the statute to pay all damages occasioned thereby. The petitioner had a right to collect and keep the water in her well ; and depriving her of it, so as to injure her land, was a damage to her. It is no answer that other land-owners had the same right in respect to their lands, and that, if the petitioner's damages had been in consequence of the exercise of those rights in his land by a land-owner, she could not have recovered damages from him. The respondent's rights in the land, and its authority to do the act which caused the damage, are given by the statute which gives a remedy to the petitioner to recover the damages.

"The precise question presented here was decided, in regard to a railroad, in Parker *v.* Boston & Maine Railroad. In that case, damages were alleged to have been occasioned, in the construction of a railroad, to land not within or adjoining the location of the road, by changing the grade of a highway and by draining a well. It is not suggested that either would be a cause of action at common law. Chief-Justice Shaw says that

(a) *Cf.* the opposite conclusion in England, § 1091.

the main question in the case is 'whether a party having land with buildings thereon, lying near the track of a railroad, but not crossed by it, can recover compensation for incidental damage caused to his land by the construction of the railroad and the structures incident to and connected with it.' After discussing the question, he says: 'We are of opinion, therefore, that a party who sustains an actual and real damage, capable of being pointed out, described, and appreciated, may sue a complaint for compensation for such damage.' In regard to the well, he says: 'The claim for damages on this ground does not depend on the relative rights of owners of land, each of whom has a right to make a proper use of his own estate, and sinking a well upon it is such proper use; and if the water, by its natural current, flows from one to the other, and a loss ensues, it is *damnum absque injuriâ*. But the respondents did not own land; they only acquired a special right to and usufruct in it, upon the condition of paying all damages which might be thereby occasioned to others.'

"Marsden *v.* Cambridge is directly to the point that the petition for damages for taking land for a highway is not a substitute for an action at law. In that case, the petitioner owned one-half of a dwelling-house and the land under it. Part of the land under the other half of the house was taken for a highway, and part was left between the location and the petitioner's land and half of the house. The owner of the other half removed it, occasioning loss of support and shelter to the petitioner's half. The court decided, without regard to the petitioner's rights as between himself and the adjoining owner, that the petition could be maintained. Mr. Justice Wells said: 'By the laying out of the street the petitioner was deprived of the support and shelter for his house from the other part of the double structure which rested upon the land of his neighbor; and was consequently put to the expense of a new wall for his own part. For the continuance of that support and shelter, of which he was in the actual enjoyment, he had at least the title and assurance arising from mutual necessity and mutual advantage, of which no one but his neighbor could deprive him. That security was taken away by the location of the street in such manner as substantially to destroy the part of the building upon the adjoining land, and render it unsuitable for further use and maintenance as a dwelling.'

"The decisions in regard to damages occasioned by taking the waters of great ponds are also in point. When the Commonwealth grants a right to take the water, a provision that payment shall be made for all damages sustained by any person in his property by the taking is held to include damages to mill-owners by depriving them of the water, although they would have no right to it as against the Commonwealth or its grantee." (a)

§ 1120. **English rule adopted in Pennsylvania.**—In Pennsylvania, the effect of the early rule and the reasons which led to the adoption of a new constitutional provision have been thoroughly discussed. Previous to the adoption of the constitution of 1874—

"the citizen whose property was injured by a corporation in the construction of its works had no remedy therefor, unless some portion of its property was actually taken. This was an immunity enjoyed by corporations, and not by individuals. Cases of great hardship soon arose. O'Connor *v.* Pittsburgh (b) was one of these. In that case the city, by the change of the grade of a street, practically ruined a valuable church property; yet there was no remedy. This court of its own motion ordered a reargument of that case, 'in order to discover, if possible,' in the almost pathetic language of Chief-Justice Gibson, 'some way to relieve the plaintiff, consistently with law, but I grieve to say we have discovered none.' Instances of a like nature might be cited indefinitely. I have selected this one as an illustration of the principle, and as perhaps one of the most striking. In all of them, however, there was an injury to the property of the plaintiff in consequence of the erection or the construction of the works of the corporation, as by the change of grade in O'Connor *v.* Pittsburgh, and the interference with water-rights in Monongahela Nav. Co. *v.* Coons.(c) In all these cases the property had been seriously injured, and yet no portion of it taken by the offending corporation." (d)

(a) Wattuppa Reservoir *v.* Fall River, 134 Mass. 267.
(b) 18 Pa. 187.
(c) 6 W. & S. 101.
(d) Paxson, J., in Penn. R. Co. *v.* Marchant, 119 Pa. 541, 554.

The Pennsylvania constitution of 1874 [a] provides that municipal and other corporations and individuals, invested with the right of taking private property for public use, shall make just compensation "for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction." This clause is held to have introduced a "radical change" in the law of the State as regards consequential injuries, so-called; under it a county has been held liable for injury in the erection of a county bridge, and this in an action on the case, no remedy having been provided by the legislature.[b] The provision is not held to mean that the railroad company is liable (when it takes no property) for noise, smoke, and dust caused by its ordinary operation; [c] there must be injury from its construction or enlargement. But if access to plaintiff's property is cut off, though no property be taken, he can recover.[d]

The rule of the English courts has been adopted in its entirety, and it is said injury means "such a legal wrong as would be the subject of an action for damages at common law." [e] The question in this case was whether a property owner, none of whose land was taken, could recover for the noise, smoke, cinders, etc., of the railroad; *i. e.*, the consequences of its operation; and it was held that he could not. The argument of the court seems to be, 1st, that if a recovery were permitted, the line could be

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[a] Art. xvi, s. 8.

[b] Chester Co. *v.* Brower, 117 Pa. 647.

[c] Penn. R. Co. *v.* Lippincott, 116 Pa. 472; Penn. R. Co. *v.* Marchant, 119 Pa. 541.

[d] Penn. S. V. R. Co. *v.* Walsh, 124 Pa. 544; Penn. S. V. R. Co. *v.* Zelnier, Ib. 560.

[e] Penn. R. Co. *v.* Marchant, 119 Pa. 541, 561.

drawn nowhere—" as far as the whistle of the locomotive can be heard and its smoke can be carried "([a]) the recovery must follow ; 2d, that if a recovery were permitted the owners of turnpikes and canals the value of which is diminished by loss of custom, of taverns and public-houses neglected, or stage-coach lines which have lost business, must all be allowed redress; 3d, that such injuries could not be ascertained in advance, while the constitution requires that they shall be ; 4th, that no such liability is imposed on individuals ; that if a natural person were the owner of the road, he would not be responsible in damages ; and that the limitations upon this principle, as that he must not establish a nuisance, have no application to the case in hand, because "the necessities of a railroad company, and the character of its business, compel it to seek the heart of a great city."([b])

§ 1121. **Rule in Illinois.**—Rigney *v.* City of Chicago ([c]) was an action on the case to recover damages alleged to have been sustained by plaintiff by reason of the construction by the city of a viaduct some two hundred and fifty feet from plaintiff's premises, but which impaired his access. The evidence was that both rental and fee value were largely reduced. It was admitted that the title to the streets affected was in the city. It was not claimed that plaintiff's possession was disturbed, or that any direct physical injury had been done his premises. The following extracts will show the scope of the opinion :

"The *gravamen* of the plaintiff's complaint is, that the defendant, in cutting off his communication with Halsted St. by way of Kinzie St., has deprived him of a public right which he en-

([a]) Ib., p. 558.
([b]) Ib., p. 560.
([c]) 102 Ill. 64.

joyed in connection with his premises, and thereby inflicted upon him an injury in excess of that shared by him with the public generally, and it is for this excess he seeks to recover, and nothing more. The instruction given for defendant denies the right of recovery for this excess, and in effect holds that where the fee of the streets is in the municipality, as in the present case, there can be no recovery in any case for an obstruction of this character, except where some direct physical injury has been done to the plaintiff's premises.

"Whether this instruction announces a correct principle of law, is the vital question in this case, and upon its determination the rights of the parties to the present controversy must depend. It is a well-recognized principle, that where a thing not *malum in se* is authorized to be done by a valid act of the legislature, and it is performed with due care and skill, in strict conformity with the provisions of the act, its performance cannot, by the common law, be made the ground of an action, however much one may be injured by it. In all such cases the statute affords a complete indemnity to those acting under its authority, notwithstanding the injury complained of would, in the absence of the statute, be actionable by the common law.

"In the absence, therefore, of any constitutional provisions on the subject, it would be competent for the legislature to authorize the taking or damaging of private property for public use, and the owner would be without redress so far as any common-law remedy is concerned.

"With a view of preventing great hardships and abuses that might arise through inconsiderate legislation in the application of this acknowledged principle of the common law, the framers of the constitution of 1848 inserted therein this express provision: 'Nor shall any man's property be taken or applied to public use without the consent of his representatives in the General Assembly, nor without just compensation being made to him.' The substance of this provision is to be found in the Constitution of the United States, and in the constitution of most, if not all, the States of the Union. Just what will amount to a taking of private property, within the meaning of this constitutional inhibition, has often been the subject of judicial inquiry, and it is believed that no general rule has yet been laid down by which the cases generally may be harmonized. The courts of final resort of some of the States hold that the constitutional provision in

question extends only to cases of an actual appropriation of private property by the State, and that it has no application where the injury is consequential rather than direct, although it may have the direct effect of substantially depriving the owner of its use.

"But other courts of equal respectability, and it is believed with better reason, hold that the change of the grade of a public highway, or the erection of a public improvement of any kind, that causes any direct physical injury to the property of a private person, by overflowing his land and the like, by reason of which he is substantially deprived of its ordinary use and enjoyment, is, within the meaning of the constitution, a taking of his property to the extent of the damages thereby occasioned." (a)

The court then reviews the history of the matter in Illinois and shows that this liberal rule of construction has been adopted in that State.

"Whatever, therefore, may be the rule in other States, it clearly appears from this review of the cases that previous to, and at the time of the adoption of the present constitution, it was the settled doctrine of this court that any actual physical injury to private property, by reason of the erection, construction, or operation of a public improvement in or along a public street or highway, whereby its appropriate use or enjoyment was materially interrupted or its value substantially impaired, was regarded as a taking of private property, within the meaning of the constitution, to the extent of the damages thereby occasioned, and actions for such injuries were uniformly sustained.

"This construction making an actual physical invasion of the property affected, the test in every case, excluded from the benefits of the constitution many cases of great hardship, for, as in the present case, it often happened that while there was no actual physical injury to the property, yet the approaches to it were so cut off and destroyed as to leave it almost valueless. Under this condition of affairs the framers of the present constitution, doubtless with a view of giving greater security to private rights by affording relief in such cases of hardship where it

(a) 102 Ill. 70.

had before been denied, declared therein that 'private property shall not be taken or damaged for public use without just compensation.' The addition of the words 'or damaged' can hardly be regarded as accidental, or as having been used without any definite purpose. On the contrary, we regard them as significant, and expressive of a deliberate purpose to change the organic law of the State. Nor were they used simply to conserve existing rights, as has been suggested by counsel, but on the contrary, in our judgment, they declare a new rule of civil conduct, from which spring new rights which did not exist under the constitution of 1848. . . . . (a)

"It is conceded that some little confusion exists with respect to the use of the expression 'physical injury' in connection with the term *property;* but it is believed this arises mainly from the ambiguous character of the latter term, and doubtless all the apparently conflicting expressions to be found in the opinions of this court upon this subject may be harmonized upon the theory that the term property, in that connection, is used in different senses. Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the constitution; yet the term is often used to indicate the *res* or subject of the property rather than the property itself, and it is evidently used in this sense in some of the cases in connection with the expression, physical injury, while at other times it is probably used in its more appropriate sense as above mentioned. The meaning, therefore, of the expression 'physical injury,' when used in connection with the term property, would in any case necessarily depend upon whether the term property was used in the one sense or the other. To illustrate: If the lot and buildings of appellant are to be regarded as property and not merely the subject of property, as strictly speaking they are, then there has clearly been no physical injury to it; but if by property is meant the right of user, enjoyment and disposition of the lot and buildings, then it is evident there has been a direct physical interference with appellant's property, and when considered from this aspect it may appropriately be said the injury to the property is direct

(a) 102 Ill. 74.

and physical; and when thus viewed, all that was said in the Stone case, *supra*, is readily harmonized with the actual decisions of this court. What is here said is equally applicable to similar expressions to be found in other cases hereafter to be noticed and we shall not repeat it in reference to them.

"Under the constitution of 1848 it was essential to a right of recovery, as we have already seen, that there should be a direct physical injury to the *corpus* or subject of the property, such as overflowing it, casting sparks or cinders upon it, and the like; but under the present constitution it is sufficient if there is a direct physical obstruction or injury to the right of user or enjoyment by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally which, by the common law, would, in the absence of any constitutional or statutory provisions, give a right of action. . . . . [a]

"The question then recurs, what additional class of cases did the framers of the new constitution intend to provide for which are not embraced in the old? While it is clear that the present constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities which directly impair the value of private property for which the law does not and never has afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuriâ*. So as to an obstruction in a public street,—if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. *In all cases to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.* In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we

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[a] 102 Ill. 77.

have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law.

"The English courts, in construing certain statutes providing compensation for injuries occasioned by public improvements in which the language is substantially the same as that in our present constitution, after a most thorough consideration of the question, lay down substantially the same rule here announced. These statutes required compensation to be made where property was 'injuriously affected,' which the English courts construe as synonymous with the word 'damaged.'

"The rule we have adopted was unanimously sustained by the House of Lords in the McCarthy case,(a) and is believed in consonance with reason, justice, and sound legal principles, and while it has not heretofore been formulated in express terms, as now stated, yet the principles upon which the rule rests are fully recognized in the previous decisions of this court." (b)

In Chicago *v.* Taylor (c) the Supreme Court of the United States reviewed Rigney's case and adopted the interpretation given by the Supreme Court of Illinois to the new constitutional provision. The rule laid down is what we have called, in discussing the English cases, Thesiger's rule. It will be noticed that the Illinois court says nothing as to the non-liability for acts for which an action at law would not have lain.

§ 1122. **Alabama.**—In City Council of Montgomery *v.* Maddox,(d) it was held that under Const. Ala. 1875, art. 14, § 7, requiring a corporation invested with the right of eminent domain to "make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improve-

(a) L. R. 7 H. L. 243.

(b) 102 Ill. 80.

(c) 125 U. S. 161.

(d) 89 Ala. 181; S. C. 7 So. R. 433; *cf.* Montgomery *v.* Townsend, 84 Ala. 478, in which a more restricted rule was adopted.

ments," a city was liable for damage to the value of a house and lot caused by a change in the grade of the adjacent sidewalk to the street level, though there was no actual taking of complainant's property, and that the measure of damages is the decrease in the value of premises arising from the change in the grade. After referring to and criticising the old common-law rule, the court said :

"The unjust distinction thus obtained at common law that one who was injured by the rightful exercise of eminent domain could not recover damages for such injury, however great, unless some portion of his property was actually taken. If the least portion of his property was taken, however, the owner could not only recover compensation for it, but also damages accruing to the remainder of such property. Where no property was 'taken,' the injury inflicted was held to be consequential damages, and compensation was disallowed, unless the offending corporation or party was made liable by force of its charter or some statute. . . . .

"Keeping in mind the cardinal rule of construction, which has regard for the old law as it stood at the making of the act, the mischief for which that law did not provide, and the remedy provided to cure this mischief, it becomes the duty of the court so to construe the clause of the constitution under consideration as to suppress the mischief and advance the remedy. 'Municipal and other corporations,' says the constitution, 'and individuals invested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction.' Const., art. 14, § 7.

"I do not discover precisely this same language in the constitution of any other State, except those of Alabama and Pennsylvania. An analogous phrase, having in view the correction of the same evil, is found in the constitutions of Illinois, Missouri, Nebraska, Georgia, California, and several other States, and provides that 'private property shall not be taken or damaged for public use without just compensation.' In Texas the

language is, 'taken, damaged, or destroyed for or applied to public use.' Art. 1, § 17. These constitutions have generally been construed to so far change the common-law rule as to entitle the injured owner to compensation for any damage, whether direct or consequential, done to private property for public use, and this without regard to any physical invasion or spoliation of the property so damaged. . . . .

"Under our constitution the right of recovery in such cases is limited, of course, to property taken, injured, or destroyed in a particular mode, viz.: 'by the construction or enlargement' of the works, highways, or improvements of the defendant corporation. It is generally conceded that provisions of this character are remedial in nature, giving damages where none before were allowed, and therefore that they should be liberally construed to effect their object."

After criticising the English rule and the application of it in Pennsylvania in terms of disapproval, the opinion continues :

"I have no difficulty, for myself, in reaching the conclusion, that, under the provisions of our present constitution, if the contiguous proprietor of a house and lot is injured, in the sense of being damaged, by the grading of a street, in the mode exhibited by the evidence in this case, and this grading is done by the authority of the municipality, and by reason of this improvement the pecuniary value of such property is diminished, the owner is entitled to be compensated for the damages he has sustained. This rule has the advantage of being plain in meaning and of easy application in practice. It harmonizes, moreover, in policy with that distinguishing feature of modern republican constitutions which has in view the protection of private rights and personal liberty against the unjust oppression and encroachments of governmental power ; and the measure of damages in such cases will be the decrease in the actual value of the property occasioned by the improvement thus made for the public benefit. Unless this construction be given the constitution, it will fail, in my opinion, to afford that just indemnity for the wrongs of the citizen which was intended to be accomplished by its framers ; which was, I repeat, to require the public to bear the burden of municipal improvements of this nature made for the public

benefit, and not to crush the private citizen by imposing upon him alone the entire damage which may have been caused to his property. Such an improvement seems to me to be 'a construction or enlargement' of a highway, within the meaning of the clause under consideration. And I do not see that any dedication of a street, however long ago it may have been made, could operate to withdraw the case from the operation of the law, in force at the time the improvement is made, which declares, in effect, that the municipality shall indemnify the citizen for any injury or damage to his property resulting from such improvement, equally with any injury or damage done him by the actual taking of such property. It can make no difference in the justice of the case if one's property is reduced to one-half of its original value by an actual taking, or by indirectly covering up his premises with earth piled up at his doorsteps in levelling a street, or in digging down his sidewalk so as to render a ladder necessary for access to the place of his abode or his business.

"In my opinion, if the uncontroverted evidence in the present case was believed by the jury, the plaintiff was entitled to a recovery. No question seems to be raised as to the amount of the verdict, the rule in Townsend's Case [a] no doubt being followed in the charge of the court, which would put the measure of plaintiff's damages at the difference in the market value of the premises before and after the sidewalk was cut down."

Of four judges, two concurred in the affirmance of the judgment on the principles declared in Townsend's Case, but not in the modification of the rule laid down in that case. The limits of the new rule in Alabama seem to be still open to discussion.

§ 1123. Other States.—In Colorado the constitution contains the provision that "private property shall not be taken or damaged for public or private use without just compensation." In City of Denver *v.* Bayer [b] the effect of this provision on the rights of owners of prop-

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[a] 80 Ala. 489.
[b] 7 Col. 113.

erty abutting on streets was considered, and it was held that such owners, whether owners of the fee to the centre or not, have an easement in the street, which is property within the meaning of the constitution; and that any interference therewith which permanently diminishes the value of their premises is a damage, if not a taking, for which compensation may be recovered. The court defined "property" as the right to "freely possess, use, and alienate." Under the constitution the municipality may raise and lower the grade, build bridges and culverts, and even authorize the operation of a street railroad; but a steam railroad in a street presents a different case: it imposes an additional burden. The court discusses the English cases, and the rule taken from them, as laid down in Illinois, and without expressly adopting it, reaches the conclusion that whether Lord Westbury's view be adopted, or the prevailing doctrine of the English courts, in either case, the abutting owner would be entitled to redress in such a case as that presented. And from a later decision (a) it would seem that in such cases the plaintiff recovers full consequential damages so called. In Texas substantially the same view is taken.(b) In Missouri, the distinction between private and public injury which runs through all the English cases, and is adopted in Illinois, is recognized, and hence the plaintiff, who sued on account of excavations in a distant street, was held remediless under the new constitutional provision providing for the case of property "damaged,"(c) inasmuch as the damage he suffered was shared with the public at large. In Louisiana, prior to the constitution of 1879, the organic law provided that

(a) Longmont *v.* Parker, 14 Col. 386.
(b) Gulf C. & S. F. Ry. Co. *v.* Fuller, 63 Tex. 467.
(c) Rude *v.* City of St. Louis, 93 Mo. 408.

"private property shall not be taken for public purposes without adequate compensation." By article 156 of the present constitution, it is provided that private property "shall not be taken nor damaged," etc. Under the first clause consequential damages were not recoverable, and it was consequently held that the legislature might authorize the building and operation of a steam railroad in the streets of a city, provided the public were not excluded from any part of the street.(a) Under the new clause, the rule is the diminution in the value of the property. "Mere consequential injuries to the owners arising from discomfort, disturbance, injury to business, and the like, remain, as they were before, *damna absque injuriâ;* particular sacrifices which society has the right to inflict for the public good."(b) And in support of this view, the court cites a recent decision of the Supreme Court of the United States,(c) which, however, does not bear the interpretation put upon it. The decision in the Supreme Court is to the point that under such constitutional provisions the damages to be considered are co-extensive with the injury to the market value; but this does not by any means exclude what were formerly called consequential damages. Proof of these is admitted whenever it can be shown to have a bearing on market value.

§ 1124. **General conclusions.**—From the preceding cases it is apparent that the new constitutional provisions have introduced into the jurisprudence of the United States a new principle of compensation, which assimilates it more closely than heretofore to that of England. They show at the same time that there is still a good deal of

(a) Werges *v.* St. Louis, C. & N. O. R.R. Co., 35 La. Ann. 641.
(b) McMahon *v.* St. Louis, A. & T. R.R. Co., 41 La. Ann. 827.
(c) Chicago *v.* Taylor, 125 U. S. 161.

room for discussion as to the precise scope and limits of the new rules. Courts which adopt the English rules completely must necessarily adopt their limitations, and exclude compensation wherever a common-law action could not have been maintained. On the other hand, courts which decline to follow the English precedents must define the limits of the new rules themselves. And here it would seem as if practical considerations must in the end govern. It would be manifestly absurd that towns and cities should be liable whenever they altered a curbstone or levelled a grade, or that a railroad should pay a distant land-owner, as suggested in the Pennsylvania case above cited, for every whistle of its locomotive, or as contended in one of the English cases that the necessity of waiting to have railway-gates opened should be compensated for. One test will no doubt always be that contained in what we have called Thesiger's rule—the test of particular injury resulting in diminution in the value of the property. When the owner's property is as valuable as it was before, it will be generally difficult to prove that it has been either "damaged" or "injured" or "injuriously affected."

Under a clause in the constitution providing that private property cannot be *damaged* without compensation, the damages must be real, not speculative. If the property is not worth less, through the construction of a railroad, there is no damage; it is no damage to the land-owner that the railroad has not enhanced the value of his lots, whilst it has added greatly to the value of other property in the neighborhood.(a)

(a) Chicago & Pacific R.R. Co. *v.* Francis, 70 Ill. 238; Eberhart *v.* Chicago, M. & St. P. Ry. Co., 70 Ill. 347. See City Council of Montgomery *v.* Townsend, 84 Ala. 479, where the court seems disposed to give a narrower construction to the constitutional provision than its language would warrant.

CHAPTER XXXVII.

THE MEASURE OF DAMAGES UNDER STATUTES OF EMINENT DOMAIN, AS AFFECTED BY THE ALLOWANCE OF BENEFITS.

§ 1125. The allowance of benefits in general.
1126. Under statutes.
1127. In the United States.
1128. Street openings—The taxing power.
1129. General benefits.
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1133. New constitutions—Alabama
1134. Arkansas.
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1145. Old constitutions—New York
1146. Kentucky.
1147. Massachusetts.
1148. Other States—General conclusions.

§ 1125. **The allowance of benefits in general.**—At common law, as we have already seen,[a] the question of the allowance of benefits does not frequently present great difficulty. If one, in committing an act which inflicts an injury upon another, at the same time benefits him, it is impossible to arrive at the total amount of the injury without taking the benefit into consideration. This must be so, at least, in all those cases in which the benefit enters into and makes part of the injury, so that the estimation of the amount of the one cannot be made without an estimation of the amount of the other. The allowance of benefits is therefore subject to two important qualifications: 1st, the allowance must be confined

[a] § 63.

to the benefits resulting from the act itself, and does not include benefit caused by other and different acts; and, 2d, a benefit conferred on the injured party in common with others, cannot be taken into consideration. This, at least, we venture to suggest as the true ground for a New York case already cited, where, in an action for a nuisance, the nuisance being a factory, the defendant was not allowed to show, in reduction of damages, that the rental value of the plaintiff's premises was increased by the increase of population, that increase consisting of employees of defendants. What the plaintiff complained of was the nuisance; while it was not the *nuisance* which increased the value of the property, but an increase of population—employees brought there by defendants' offer of employment, or by their acceptance of it.(a)

§ 1126. **Under statutes.**—But the question of the allowance of benefits at common law differs at many points from the allowance of benefits under the statutes of eminent domain. At common law the benefit is conferred by the act of a wrong-doer; under the statutes of eminent domain no wrong is done. The statute authorizes the work and directs the payment of the ensuing damages. As we have already seen in considering the rules established in England, it is a universal principle that the land-owner can recover only for acts *made lawful* by the statute. For acts which are not lawful under it, as for injuries caused by negligence in construction or operation of a railroad or other public work, he can undoubtedly recover, but in an action on which the condemnation statutes have no bearing. In discussing the question of benefits it is important to keep in view this distinction.

(a) Francis *v.* Schoellkopf, 53 N. Y. 152.

§ 1127. **In the United States.**—In the United States the question of benefits is of very considerable importance, and it arises chiefly in two great classes of cases: the assessment of benefits in proceedings to open highways and streets by public authority, and in proceedings to condemn private property for public use by grantees of franchises. There is a broad distinction between these two classes of cases to which it is necessary here to advert.

§ 1128. **Street openings—The taxing power.**—It is perfectly well settled in New York, and probably in most other States, that benefits may be offset against damages in the case of street openings.(a) But this presents a materially different case from the ordinary exercise of the power of eminent domain, involving as it does the right of taxation as well. When a street is opened the usual course is to provide by law for the assessment of the expenses, including the damages for any land taken, against the owners of land within a limited district, on the ground that the land which enjoys the immediate benefit of the improvement should bear the expenses. The assessment here falls in some cases on the owners of land taken; in other cases on those no part of whose land is taken. In the case of an owner, part of whose land is taken, it makes no difference whether he is first paid for the land and afterwards assessed for the benefit, or whether the benefit is set off against the damages. Again, the benefit is, in such jur-

(a) Livingston *v.* The Mayor, 8 Wend. 85; People *v.* The Mayor, 4 N. Y. 419, overruling People *v.* The Mayor, 6 Barb. 209; Betts *v.* Williamsburgh, 15 Barb. 255; Granger *v.* City of Syracuse, 38 How. Pr. 308; Long Island R.R. Co. *v.* Bennett, 10 Hun 91; Nichols *v.* Bridgeport, 23 Conn. 189; Dorgan *v.* City of Boston, 12 All. 223; Newby *v.* Platte Co., 25 Mo. 258; State *v.* City of St. Louis, 62 Mo. 244; McMasters *v.* Com., 3 Watts 292; Genet *v.* Brooklyn, 99 N. Y. 296; *contra*, Sutton *v.* Louisville, 5 Dana 28.

isdictions, not the same species of benefit which has been so much discussed in eminent domain cases. It really represents no more than the owner's share in the expenses of the improvement, part of which are the damages for his land taken. It is assumed in such cases that the lands assessed are benefited to the exact extent of the land damages and the cost of the work, and a tax is laid in accordance with this assumption. This system may in practice produce very unjust results, and yet, inasmuch as it is supported by the taxing power, it cannot be successfully attacked on the ground that the owner does not receive "just compensation." As has recently been said by the New York Court of Appeals in Genet *v.* City of Brooklyn: ([a])

"The assessments imposed upon the lands of the plaintiff's grantor was, as has been said, a tax and represented the proportion of the aggregate sum which in the judgment of the commissioners exercising by delegation the power to distribute the tax, should be charged upon the several parcels as their respective contributions to the aggregate expense. Assuming that the charge exceeded the benefit, it was nevertheless made under the authority and direction of the legislature in the exercise of an undoubted legislative power, and it cannot be invalidated by proof that the charge was unjust or unequal or even arbitrary."

And so from the language of the court in City of Detroit *v.* Daly ([b]) it would seem as if "general" and "local" benefits were to be considered as merely artificial terms to represent the estimated assessment by which the damages are offset, in the first case by general taxation of the whole public, in the second by taxation of the district.

In New York the general rule in assessing the bene-

([a]) 99 N. Y. 296, 308.
([b]) 68 Mich. 503.

fits in opening streets is to consider the improvement in market value, without regard to its present use or the purpose of the owner in relation to its future enjoyment.[a] But in the case of property held for ecclesiastical purposes, when there is a qualified form of disposition, the rule is different.[b] Thus, in People *ex rel.* Howlett *v.* Mayor,[c] it was held that in assessing the benefits to church property, it was proper to consider the peculiar uses to which it was put, and the qualified power of disposition over it. In the same case it was held that in ascertaining what was the relative benefit to different parcels of land, "the situation of the different lots, and their relative adaptation to uses which would be promoted by the improvement," might be considered. It was also held that the fact that a building which, from its position and use, was dangerous to other buildings, would be removed, was a proper matter to be considered in estimating benefits. But it is unnecessary to consider the matter further in detail here.

§ 1129. **General benefits.**—Leaving, therefore, out of consideration the question of benefits where the question arises between the land-owner and the public authorities, we now proceed to examine the great class of cases where grantees of franchises are empowered to take private property for public use under the power of eminent domain, only referring to the other class, where the principles involved are the same; and here we find that in most cases what are called general benefits are not allowed for. This is sometimes by constitutional provision, sometimes by

(a) People *ex rel.* Howlett *v.* The Mayor, 63 N. Y. 291; *In re* William and Anthony Streets, 19 Wend. 678.

(b) People *ex rel.* Howlett *v.* The Mayor, 63 N. Y. 291; Matter of the Mayor, etc., 11 Johns. 77; Matter of Albany Street, 11 Wend. 150.

(c) 63 N. Y. 291, 300.

statute, and sometimes probably independently of either. By general benefit is meant that sort of benefit or advantage which accrues to the whole body of those affected by the improvement, or to the whole body in an immediate neighborhood. It has been said by a court of high authority that general benefits mean the *anticipated* rise in the value of property by reason of the improvement.(a) But it would not seem to make any difference whether the benefit is anticipated or not. The fact that it is anticipated merely shows that it is a benefit not yet realized. But whether anticipated, or already showing itself in the improved market value of property in the neighborhood, the question of its generality is the fundamental question involved. There are many reasons why benefits of this sort should not be allowed for. It is frequently said that the objection to general benefits is that the land-owner pays in taxation for his share of such benefits, and that therefore there would be an injustice in offsetting them against damages.(b) This may well be doubted, except in the case of street openings. In that of railroads, etc., there is no resort to the taxing power. What finally determines the amount of taxation is the expense of government, and not the total assessable value of real estate. It is not an essential principle of taxation that it should increase with every increase in value of the property of the citizen.

A better reason for denying general benefits is that the connection between the improvement and the benefit is highly speculative. If estimated in advance the amount of benefit is wholly speculative. If inferred from a general rise in market value, it is always difficult, and in many cases impossible, to say how much of the rise is

(a) Meacham *v.* Fitchburg R.R. Co., 4 Cush. 291.
(b) Com'rs of Pottawatomie Co. *v.* O'Sullivan, 17 Kas. 58.

due to the improvement, and how much to other causes. The increase may be due to a temporary speculation and inflation and afterwards wholly disappear.

When we consider for what it is that the land-owner obtains damages, we shall see further grounds for the objection to general benefits. He is given damages (to give the right its widest possible extent) because his property is either *taken* or *injured* for a *public use*. The act for which the damages are allowed is the *taking or injury*. But it is not through the taking or injury that he is benefited. It is simply because the use is of a kind which gives an added value to property. Increased facilities for getting to market, and for travelling,(a) the opening of new routes for population, and the establishment of new centres of population, are instances of general benefits. But the taking or injury does not of itself produce these advantages, because they are in general shared equally by those in the neighborhood whose land is neither injured nor taken. The general rule, then, with regard to general benefits, or such as are shared in common with the public, is, that they are not to enter as an element of offset in the estimate of damages. As Dewey, J., says in Meacham *v.* Fitchburg R.R. Co.: (b) "The party whose land has been taken for a railroad has a right, in common with his other fellow-citizens, to the benefit arising from the general rise of property in the vicinity, occasioned by the establishment of the railroad and the facilities connected therewith." And this view has, it would seem, been generally adopted by the courts.(c)

(a) Freedle *v.* North Carolina R.R. Co., 4 Jones L. 89; Meacham *v.* Fitchburg R.R. Co., 4 Cush. 291.

(b) 4 Cush. 291, 297.

(c) Upton *v.* South Reading Branch R.R. Co., 8 Cush. 600; Farwell *v.* City of Cambridge, 11 Gray 413; Putman *v.* Douglas Co., 6 Oregon 328;

§ 1130. **Special benefits.**—As general benefits are such advantages resulting from the improvement as affect the public or neighborhood generally, so special benefits are such as have a narrower operation, are capable of specific proof and produce some special advantage to the landowner, which is not shared by others.[a] Under a statute providing only for the allowance of special benefits, it has been held by the Supreme Court of Wisconsin that a benefit of this sort is one which enhances the value of the land affected by it, by improving its physical condition and adaptability for use, such as by reclaiming waste land, by draining or flowing a marsh, by aiding in the development of a water-power, by dispensing with the necessity of maintaining fences, or by opening a mine or quarry or the like;[b] and such seem to be true instances of special benefits which enter into and effect the damage itself. A case is presented by the establishment of a railroad station as to which the decisions of the courts are not harmonious. In the case just cited it was said that such a station is a general public benefit. In Massachusetts, on the other hand, it is said that railway stations may be general or special benefits according to circumstances.[c] In Illinois they seem to be regarded as a special benefit.[d]

When benefits are allowed, they are confined, as in the case of damages, to the property immediately affected, and benefits to a separate and distinct parcel of land cannot

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Tobie *v.* Commissioners of Brown Co., 20 Kas. 14; Winona & St. Peter R.R. Co. *v.* Waldron, 11 Minn. 515; St. Louis & St. Jo. R.R. Co. *v.* Richardson, 45 Mo. 466; Root's Case, 77 Pa. 276; Keithsburg & E. R.R. Co. *v.* Henry, 79 Ill. 290; Sexton *v.* North Bridgewater, 116 Mass. 200.

[a] Childs *v.* New Haven & N. Co., 133 Mass. 253.

[b] Washburn *v.* Milwaukee & L. W. R.R. Co., 59 Wis. 364.

[c] Shattuck *v.* Stoneham Branch R.R. Co., 6 All. 115; Childs *v.* New Haven & N. Co., 133 Mass. 253.

[d] Hayes *v.* Ottawa, Oswego & F. R. V. R.R. Co., 54 Ill. 373.

be considered.(a) It is to be noticed, too, that the allowances for benefits never extend beyond the extinguishment of the claim for compensation, nor constitute a counter-claim for the excess.(b) It has been held in Georgia that in an action for negligence in construction, the railroad cannot offset incidental benefits arising from the construction of the road.(c) In all cases where the inquiry is as to the difference in value of the land taken as *a whole*, benefits to a part of the land must be allowed for, otherwise the consideration of the jury would be confined merely to that part of the land damaged.(d)

§ 1131. **State constitutions—Local rules—Special statutes.**—In examining any decision relating to the measure of damages under the eminent domain statutes it is necessary, first, to keep in view the provisions of the local constitution on the subject; and, second, those of the general or special statutes relating to benefits. The constitution always contains a provision that compensation shall be made for "taking" private property; many of the more recent constitutions contain a further provision that compensation must be given where property is *injured* or *damaged*. These constitutions also sometimes contain provisions with reference to the allowance of benefits, though it is more usual to find these in the special statutes relating to eminent domain. Finally, it very frequently happens that the special statute under which the work is done contains a definite provision, fix-

(a) State *v.* Digby, 5 Blackf. 543; Meacham *v.* Fitchburg R.R. Co., 4 Cush. 291; Paducah & M. R.R. Co. *v.* Stovall, 12 Heisk. 1; Philadelphia & R. R.R. Co. *v.* Gilson, 8 Watts 243; New York, L. & W. Ry. Co. *v.* Arnot, 27 Hun 151.

(b) Wilmington & W. R.R. Co. *v.* Smith, 99 N. C. 131.

(c) Gilbert *v.* Savannah, Griffin & N. A. R.R. Co., 69 Ga. 396.

(d) Wabash, St. L. & P. Ry. Co. *v.* McDougall, 126 Ill. 111; Cemetery Ass'n *v.* Minnesota & N. W. R.R. Co., 121 Ill. 199.

ing the principle on which damages are to be assessed, which renders a resort to the constitution unnecessary. Thus, in New York, where the constitutional provision is merely that compensation shall be given for property "taken," the legislature has in some cases gone farther, and established a rule as wide as that prevailing in England, or in those States which allow compensation for property "injured." Furniss *v.* Hudson R. R.R. Co.[a] is such a case. The act incorporating the railroad[b] expressly provided that damages should be given, not only for property taken, but for property in any way "affected," for injury to buildings, or injury through "any operation" connected with the construction of the road, and even that consequential damages happening after the construction of the road, and not foreseen by the appraisers, should be appraised. So in Wood *v.* Auburn & Rochester R.R. Co.[c] the act specially provided for an assessment of the damages by *taking lands*, by *injury to buildings, and in the construction of the road.*[d]

In many States recent constitutions provide that either in all, or in certain specified classes of cases, benefits shall be wholly disregarded. Notwithstanding the doubts suggested in Cleveland & Pittsburgh R.R. Co. *v.* Ball,[e] and Little Miami R.R. Co. *v.* Collett,[f] that special benefits may not be covered by such provisions, the courts have uniformly held that such provisions exclude from consideration every species of benefit whatever.[g]

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[a] 5 Sandf. 551.
[b] L. 1846, c. 216, secs. 10, 28.
[c] 8 N. Y. 160, 168.
[d] L. 1836, c. 349, s. 7.
[e] 5 Ohio St. 568.
[f] 6 Ib. 182.
[g] Frederick *v.* Shane, 32 Ia. 254; Bland *v.* Hixenbaugh, 39 Ia. 532; Britton *v.* Des Moines, O. & S. R.R. Co., 59 Ia. 540.

Under such provisions the measure of damages is the difference between the fair marketable value of the premises without the improvement, and the value of the same with the improvement, but irrespective of the benefit which will result from the improvement. It should be noticed that the measure of damages is not, strictly speaking, the difference in value *before* and *after* the appropriation. The difference to be the basis of the allowance of damages should have been produced by means of the *appropriation* itself, and no other cause.(a)

§ 1132. **Originally no distinction between general and special benefits.**—It is important to notice that the distinction between these two classes of benefits is one which has only been gradually recognized. From the early statutes on the subject it would appear that the legislature intended to exclude all benefits. The general scope of the eminent domain statutes was, as has been said, the expropriation of the owner. For his property "taken" he was to be paid, but as he could not recover what were called consequential damages, so he was entitled to all benefits. The early statutes, too, contemplated an assessment in advance, and looking to the future it seemed a simple matter to exclude from consideration contingent advantages often of a highly speculative nature. For example, the land-owner was to get the price of his land taken, no matter whether its value was enhanced by the improvement or not. In New York the language of the statute is, that benefits whether "real or supposed" are to be excluded—a much more satisfactory classification than that into general and special, inasmuch as it is in accord with the fundamental rule of damages which makes certainty of proof a primary test. The scheme of

(a) Brooks *v.* Davenport & St. Paul R.R. Co., 37 Ia. 99.

the act was that not merely such benefits as were hypothetical, but even such as were capable of proof, must be excluded.

But it was soon seen that there was a difficulty in excluding certain classes of benefits of a practical character. Where land was taken, as has been shown, all benefits would be excluded, and the statute satisfied, and this rule still holds, as we shall see, in almost all jurisdictions, and the owner of a parcel of land obtains the value as enhanced by the improvement. But where land is taken in part, a more difficult case is presented. The measure of damages generally laid down in the early cases was the value of the land taken, and the damages to the remainder; but if the part not taken was drained by the taking, it would not be *damaged* so much as if it were left exposed to floods. This was not supposed to be allowing benefits, but ascertaining damages. But as the injustice of the old rule excluding consequential damages was broken in upon, and many species of damage were admitted which did not flow directly from the taking, but from the improvement itself, the rule of damages to the land taken, increased by the damage to the part not taken became gradually changed into the rule, often treated as having the same meaning, of the difference in value of the land unaffected by the improvement, and the land affected by it. Under this rule it is often very difficult to exclude even general benefits except by some highly artificial process, for the market value of the land is affected by every species of benefit conferred, and to discriminate between such enhancement of it as is produced by general benefits, and such as is produced by special benefits, must be often a matter of speculation. The matter is rendered still more difficult, when, as in so many modern cases, no land is taken at all, in a physical sense, but "property" is taken

through a destruction of easements. Here the measure of damages is necessarily the value of the easement, which can be estimated in no other way than by taking the difference between the value of the property with and without the easements into which of course benefits enter. When we come to consider the history of the New York Elevated Railroad cases we shall find this difficulty presented in them in a highly complicated form, for in these the "taking" is assumed to be at a date years after the roads have been established. What we desire to point out here is, that owing to the reasons mentioned statutes excluding benefits are not always literally complied with. We proceed to consider the course of decision in several of the more important jurisdictions.

§ 1133. **New constitutions—Alabama.**—In Alabama the most important constitutional provisions as successively adopted are as follows :

1819. Art. 1, § 13. . . . . "Nor shall any person's property be taken or applied to public use, unless just compensation be made therefor."

1867. Art. 13, § 5. "No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation ; which compensation shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law."

1875. Art. 1, § 24. "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use the same as individuals. But private property shall not be taken for or applied to public use, unless just compensation be first made therefor ; nor shall private property be taken for private use, or for the use of corporations other than municipal without the consent of the owners ; *provided, however*, that the general assembly may, by law, secure to persons or corporations the right of way

over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and *provided* that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any kind of corporations other than municipal, or for the benefit of any individual or association."

Art. 13, § 7. "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken or injured or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction."

In Alabama the general rule is laid down that the measure of damages is the difference in value with and without the improvement; but this does not imply that *general benefits* are to be included.([a])

§ 1134. Arkansas.

1868. Art. 1, § 15. "Private property shall not be taken for public use without just compensation therefor."

Art. 5, § 48. . . . . "No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law."

1874. Art. 2, § 22. "The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated, or damaged for public use without just compensation therefor."

Art. 12, § 9. "No property nor right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money or first se-

([a]) Alabama & F. R.R. Co. *v.* Burkett, 42 Ala. 83; 46 Ala. 569; Hooper *v.* Savannah & M. R.R. Co., 69 Ala. 529; Jones *v.* New Orleans & S. R.R. Co., 70 Ala. 227.

cured to him by a deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law."

§ 11. "Foreign corporations . . . . shall not have power to condemn or appropriate private property."

In this State the consideration of benefits is excluded by the constitution, and the measure of damages is held to be the market value of the land actually appropriated, together with the injury to the remainder, or the difference in value of the tract before the taking and the market value of what remains after the taking, *excluding any enhancement in value by the building of the road.*[a] And in a case where the defendant proposed to show the value of the land before the road was projected, it was held that the inquiry must be confined to the market value of the land at the time it was taken.[b] The market value of the land at the time it is taken may of course be enhanced by the improvement.

§ 1135. California.

1849. Art. 1, § 8. . . . . "Nor shall private property be taken for public use without just compensation."

1879. Art. 1, § 14. "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained or paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law."

In California it has been laid down that benefits both general and special may be offset against damages and

[a] St. Louis, A. & T. R.R. Co. *v.* Anderson, 39 Ark. 167.

[b] Texas & St. Louis Ry. Co. *v.* Cella, 42 Ark. 528.

the value of the part taken.[a] In this case the Supreme Court said :

"It appears from the report of the commissioners that there were no *special benefits* to the land not taken resulting from the construction of the said road ; though they also find that it will thereby be enhanced in value. . . . . From this the defendant's counsel deduce the argument that inasmuch as this land will only be benefited with other contiguous lands, and will receive no benefit peculiar to itself, it does not come within the rule which requires benefits to be set off against damages. . . . . But there is no valid reason for this distinction. The theory of the statute is that the land-owner shall receive a fair, just compensation for the damage he suffers, and if that portion of his tract which is not taken will be enhanced in value by the construction of a railroad, his damages will be diminished to the extent of the enhancement."

The only case cited was San Francisco, A. & S. R.R. Co. *v.* Caldwell.[b] In this case it was decided that the measure of damages was the difference between the value of the whole tract without the railroad, the value of the part not taken after the railroad is constructed. This, however, is the same rule that is laid down in the States in which *general benefits* are excluded from the computation.

The question seems to be set at rest, so far as private corporations are concerned, by the present constitution.[c] Thus in Moran *v.* Ross[d] it was held that private individuals may condemn lands for railroad purposes, and are entitled to offset the damages to land not taken by the amount of benefits accruing from the improvement of such land ; the provisions of section 14 of article 1, of the constitution, prohibiting such deduction, and thus imposing upon the party seeking to condemn lands for public

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[a] California Pac. R.R. Co. *v.* Armstrong, 46 Cal. 85, 90.

[b] 31 Cal. 367.

[c] Pacific Coast Ry. Co. *v.* Porter, 74 Cal. 261.

[d] 79 Cal. 549; *acc.* San José & A. R.R. Co. *v.* Mayne, 83 Cal. 566.

use a burden greater than is provided by the Code of Civil Procedure, are confined by their terms to the condemnation of the right of way by "corporations other than municipal," and do not apply to this case. The existence of two distinct rules of damages, one for corporations and another for private individuals, may be unjust, but is a matter with which the courts have nothing to do, the provisions of the law being plain.

§ 1136. Colorado.

1876. Art. 21, § 14. "That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches on or across the land of others, for agricultural, mining, milling, domestic, or sanitary purposes."

§ 15. "That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

In Colorado the measure of damages is the depreciation of market value, and *particular benefits* must be taken into the account.([a])

§ 1137. Georgia.

1865. Art. 1, § 17. "In cases of necessity, private ways may be granted upon just compensation being first paid; and with this exception private property shall not be taken, save for pub-

([a]) Denver & R. G. Ry. Co. *v.* Bourne, 11 Col. 59; City of Denver *v.* Bayer, 7 Col. 113.

lic use, and then only on just compensation, to be first provided and paid, unless there be a pressing, unforeseen necessity; in which event the general assembly shall make early provision for such compensation."

1868. Art. 1, § 20. "Private ways may be granted upon just compensation being paid by the applicant."

1877. Art. 1, Sec. III, ¶ 1. "In cases of necessity, private ways may be granted upon just compensation being first paid by the applicant. Private property shall not be taken or damaged for public purposes, without just and adequate compensation being first paid."

The Georgia rule is that the part taken must be paid for in any case, but that benefits both general and special may be set off against damages to the remainder. The early case of Young *v.* Harrison ([a]) seems to be overruled,([b]) so far as it holds that the benefits may be offset against the part taken.

Under the new constitutional provision it is held that benefits both general and special must be offset, because if there is no damage there can be no recovery, and if the benefits are equal to or greater than the loss from *this cause*, there can be no recovery.([c]) Such is now said to be the settled law of the State, and if in grading a street, property is decreased in value for residence purposes, and yet otherwise improved in value to an equal amount, there can be no recovery.([d])

§ 1138. Illinois.

1818. Art. 8, § 11. . . . . "Nor shall any man's property be taken or applied to public use, without the consent of his representatives in the general assembly nor without just compensation being made to him."

([a]) 17 Ga. 30.

([b]) Jones *v.* Wills Valley R.R. Co., 30 Ga. 43; Savannah *v.* Hartridge, 37 Ga. 113; Atlanta *v.* Central R.R. Co., 53 Ga. 120; Selma, R. & D. R.R. Co. *v.* Keith, 53 Ga. 178; Augusta *v.* Marks, 50 Ga. 612.

([c]) City of Atlanta *v.* Green, 67 Ga. 386.

([d]) Moore *v.* City of Atlanta, 70 Ga. 611.

1848. Art. 13, § 11. Same.

1870. Art. 2, § 13. "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks without consent of the owners thereof, shall remain in such owners, subject to the use for which it was taken."

In Illinois, prior to the constitution of 1870, general benefits seem to have been offset.[a] In Page *v.* Chicago, M. & St. P. Ry. Co.,[b] a case under the new provision, it is said that the measure of damages would be the *difference in value*, notwithstanding a statute providing that "no benefits or advantages" are to be offset against the damages. In the same case it is said that it is "admitted that any mere general and public benefit or increase of value received by the land in common with other lands in the neighborhood" *is not to be taken into consideration.* In Carpenter *v.* Jennings[c] the court held that the constitution of 1870,[d] providing for compensation in case of "damage," prohibits the setting off of benefits, but it is evident from a later case[e] that the court meant the constitution supplemented by the eminent domain statute of 1872, which expressly prohibited benefits. This last case also expressly holds that *general* benefits cannot be considered. But *special* benefits, notwithstanding the above cases, may be considered, as otherwise the actual damages cannot be ascertained,[f] and the measure of damages is the

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[a] State *v.* Evans, 3 Ill. 208; Alton & Sangamon R.R. Co. *v.* Carpenter, 14 Ill. 190; Curry *v.* Mt. Sterling, 15 Ill. 320; People *v.* Williams, 51 Ill. 63.

[b] 70 Ill. 324.

[c] 77 Ill. 250; *acc.* Deitrick *v.* Highway Com'rs, 6 Ill. App. 70.

[d] Art. 2, § 13.

[e] Keithsburg & Eastern R.R. Co. *v.* Henry, 79 Ill. 290.

[f] Hyde Park *v.* Dunham, 85 Ill. 569; Green *v.* Chicago, 97 Ill. 370; Hyslop *v.* Finch, 99 Ill. 171; St. Louis, J. & S. R.R. Co. *v.* Kirby, 104 Ill. 345;

difference of value before and after the construction of the road.(a) The land-owner in Illinois receives under the constitution and statutes of that State the value of the land taken, while special benefits go against the damages to the remainder.(b) Only the early cases can be cited in favor of the proposition that general benefits may be offset. The land-owner gets the benefit of any general enhancement of the value of the land taken.(c)

In proceedings for the condemnation of a strip of land, in the middle of a larger tract, for the use of a railroad, the jury were instructed that the total compensation to be given to the owner of the land is the difference between the value of the entire tract of land before condemnation and the value of what remains after the taking of part. This was held not to be erroneous, as directing the jury to deduct any benefits which the railroad might cause to the remainder of the land from the *value of the strip taken*, as this could only be true where the benefits exceeded the damages to the land not taken, and the jury in fact found that the damages to the land not taken exceeded the benefits.(d)

In this case the Supreme Court of Illinois said:(e) "The parties agree that the value of the property taken and the damages to the property not taken should be assessed as of the date of filing the petition. And this being so, there can be no presumption that general

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McReynolds *v.* Burlington & O. R. Ry. Co., 106 Ill. 152; Chicago & E. R.R. Co. *v.* Blake, 116 Ill. 163; Hyde Park *v.* Washington Ice Co., 117 Ill. 233.

(a) Dupuis *v.* Chicago & N. Wis. Ry. Co., 115 Ill. 97.

(b) Concordia Cemetery Ass'n *v.* Minnesota & N. W. R.R. Co., 121 Ill. 199; Chicago, B. & N. R.R. Co. *v.* Bowman, 122 Ill. 595; Harwood *v.* City of Bloomington, 124 Ill. 48.

(c) Cook *v.* South Park Com'rs, 61 Ill. 115; Kerr *v.* South Park Com'rs, 117 U. S. 379; Page *v.* Chicago, M. & St. P. Ry. Co., 70 Ill. 324.

(d) Concordia Cem. Ass'n *v.* Minnesota & N. W. R.R. Co., 121 Ill. 199.

(e) p. 205.

benefits have been deducted from the valuation. The taking and damaging are, in theory, then done, and it is the value of the property as then presumably enhanced by the prospective benefits to result from the construction of the road, which the owner is entitled to be reimbursed to the extent he has been deprived of it by the taking and damaging."

§ 1139. Louisiana.

Civil Code, Art. 497. "No one can be deprived of his property, unless for some purpose of public utility and on consideration of an equitable and previous indemnity, and in a manner previously prescribed by law. By an equitable in this case is understood, not only a payment for the value of the thing of which the owner is deprived, but a remuneration for the damages which may be caused thereby."

1845. Title 6, Art. 109. "Vested rights shall not be divested unless for purposes of public utility, and for adequate compensation previously made."

1852. Title 6, Art. 105. Same.

1864. Title 6, Art. 109. Same.

1868. Title 6, Art. 110. Same, omitting the word *previously*.

In Louisiana the value of the part taken must be paid for, but benefits both general and special may be offset against the damages to the remainder. In this State the rule is adopted that the enhanced value of the land due to the improvement must be altogether disregarded; *i. e.*, in estimating the value of the land taken, the value as it was before the improvement is the measure of damages. This, it should be said, is in Louisiana prescribed by statute. On the other hand, damages to the remainder can be offset by the advantages and benefits to the owner derived from the projected improvement and the enhanced value of the land not sought to be appropriated.(a)

(a) New Orleans Pacific Ry. Co. *v.* Gay, 31 La. An. 430; Burrank *v.* New Orleans, Manning 231; New Orleans, O. & G. W. R.R. *v.* Lagarde, 10 La.

§ 1140. Missouri.

1820. Art. 13, § 7. . . . "And that no private property ought to be taken or applied to public use without just compensation."

1865. Art. 1, § 16. Same.

1875. Art. 2, § 20. "That no private property can be taken for private use with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law; and that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public."

Art. 2, § 21. "That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such a manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without the consent of the owner thereof shall remain in such owner subject to the use for which it is taken."

In Missouri special benefits only may be set off both against the value of the part taken and damages to the remainder.[a] The measure of damages is said to be the

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An. 150; Vicksburg, S. & T. R.R. Co. *v.* Calderwood, 15 Id. 481; Vicksburg, S. & P. R.R. Co. *v.* Dillard, 35 La. An. 1045; New Orleans Pacific Ry. Co. *v.* Murrell, 36 Id. 344.

[a] Newby *v.* Platte Co., 25 Mo. 258; Louisiana & F. P. R. Co. *v.* Pickett, 25 Mo. 535; Pacific R.R. Co. *v.* Chrystal, 25 Mo. 544; St. Louis & St. J. R.R. Co. *v.* Richardson, 45 Mo. 466; Lee *v.* Tebo & N. R.R. Co., 53 Mo. 178; Quincy, M. & P. R.R. Co. *v.* Ridge, 57 Mo. 599; Mississippi R. B. Co. *v.* Ring, 58 Mo. 491; Hosher *v.* Kansas City, St. J. & C. B. R.R. Co., 60 Mo. 303; City of Springfield *v.* Schmook, 68 Mo. 394; Wyandotte, K. C. & N. Ry. Co. *v.* Waldo, 70 Mo. 629; Combs *v.* Smith, 78 Mo. 32; Jackson Co. *v.* Waldo, 85 Mo. 637; State *v.* City of Kansas, 89 Mo. 34; Daugherty *v.* Brown, 91 Mo. 26; Welsh *v.* C. B. & K. C. Ry. Co., 19 Mo. Ap. 127.

difference between the value of the land without the improvement, and its value with the improvement.

§ 1141. Nebraska.

1867. Art. 1, § 13. "The property of no person shall be taken for public use without just compensation therefor."

Art. 2, tit. "Eminent Domain," § 3. "The people of the State, in their right of sovereignty, are declared to possess the ultimate property in and to all lands within the jurisdiction of the State."

1875. Art. 1, § 21. "The property of no person shall be taken or damaged for public use without just compensation therefor."

In Nebraska the rule is that special benefits only may be considered. These may be set off against the damages to the remainder, but not against the value of the land taken.(a) And in that State, under the new constitutional provision that no property shall be taken "or damaged" for public use without just compensation, it has been held in a street grading case, that although the property may sell for as much after the improvement as before, this does not necessarily preclude the owner from the recovery of damages.

"Suppose two or more railroads reaching out into the interior of the State were to be built terminating in Omaha, with the right to lay their tracks along Farnam Street. Such roads, when constructed, no doubt would greatly enhance the value of property in the city of Omaha, while by reason of destroying Farnam Street as a public thoroughfare they would prevent the rise of property on that street in proportion to other portions of the city; yet if the argument of the defendant's attorney is sound, if real estate on Farnam Street did not depreciate in value by reason of its occupancy by the railways, the owners could recover nothing, although property in other portions of the city had advanced fifty or one hundred per cent." (b)

(a) Wagner *v.* Gage Co., 3 Neb. 237; Fremont, E. & M. V. Co. *v.* Whalen, 11 Neb. 585.

(b) Schaller *v.* City of Omaha, 23 Neb. 325.

§ 1142. Pennsylvania.

1776. Art. 8. . . . . "But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives."

1790. Art. 9, § 10. . . . . "Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being made."

1838. Art. 7, § 4. "The legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners of said property, or give adequate security therefor, before such property shall be taken."

Art. 9, § 10. Same as in 1790.

1873. Art. 1, § 10. . . . . "Nor shall private property be taken or applied to public use without authority of law, and without just compensation being first made or secured."

Art. 16, § 8. "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed, by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction. The general assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to the course of the common law."

In Pennsylvania the rule is the difference between what the property unaffected by the obstruction would have sold for at the time the injury was committed, and what it would have sold for as affected by the injury.(a)

(a) Schuylkill Nav. Co. *v.* Thoburn, 7 S. & R. 411; Brown *v.* Corey, 43 Pa. 495; East Penn. R.R. Co. *v.* Hottenstine, 47 Pa. 28; Hornstein *v.* Atlantic & G. W. R.R. Co., 51 Pa. 87; Delaware, L. & W. R.R. Co. *v.* Burson, 61 Pa. 369; East Brandywine & W. R.R. Co. *v.* Ranck, 78 Pa. 454; Shenango & A. R.R. Co. *v.* Braham, 79 Pa. 447; Cummings *v.* Williamsport, 84 Pa.

It is competent to prove that the value of the land not taken has been enhanced by the improvement.(a) The general appreciation of property in the neighborhood, consequent to the projected construction of the road, cannot enter into the calculation.(b) In Pennsylvania it is held that the land actually taken must be compensated for, and that a comparison of advantages and disadvantages is only required in determining the question of damages to the remainder; in determining that question, only such benefits as are peculiar to the property and not such as are common to the neighboring properties are to be considered; a general appreciation of land cannot be considered.(c)

§ 1143. Texas.

1836. Republic of Texas, Declaration of Rights, 13th. "No person's particular services shall be demanded, nor property taken or applied to public use, unless by the consent of himself or his representatives, without just compensation being made therefor according to law."

1845. State of Texas, Art. 1, § 14. "No person's property shall be taken or applied to public use, without adequate compensation being made, unless by the consent of such person."

1866. Art. 1, § 14. Same.

1868. Art. 1, § 14. Same.

1876. Art. 1, § 17. "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured, by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or im-

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472; Pittsburgh, B. & B. Ry. Co. *v.* McCloskey, 110 Pa. 436; Setzler *v.* Penn. S. V. R.R. Co., 112 Pa. 56.

(a) Plank Road Co. *v.* Rea, 20 Pa. 97.

(b) Setzler *v.* Pa. S. V. R.R. Co., 112 Pa. 56, and cases cited; Pittsburgh, B. & B. Ry. Co. *v.* McCloskey, 110 Pa. 436; Long *v.* Harrisburg & P. R. Co., 126 Pa. 143.

(c) Long *v.* Harrisburg & P. R. Co., 126 Pa. 143.

munities shall be made ; but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof."

In Texas the owner of land taken is said to be entitled to the intrinsic value of the land taken without reference to the profit or advantage that he may derive from the construction of the improvement. He is also entitled to such damages as are occasioned to the remainder, and in estimating these the benefits and advantages are to be offset.[a] This appears to be the same as the Kentucky rule, but nothing is said as to whether the value of the land taken is the value of the land unaffected by the proposed improvement.

Mr. Lewis in his work on Eminent Domain refers to the late case of Bourgeois *v.* Mills,[b] as being in conflict with the earlier cases. This case undoubtedly assumes the rule under a particular statute to be that the damages may be wholly offset by benefits. But the present constitution of Texas[c] contains a provision that when property is taken, "except for the use of the State," compensation in money must first be secured ; the implication seems to be that in case the property is taken for State use, compensation may be in benefits. In Bourgeois *v.* Mills the land was taken for a public road. The Texas decisions do not seem to leave the law on this head free from doubt.

In Texas under the new constitution the measure of damages is the difference between the value of the property, as it stands affected by the improvement, and its fair value, as it would be but for the acts complained of.

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[a] Buffalo Bayou B. & C. R.R. Co. *v.* Ferris, 26 Tex. 588; Tait *v.* Matthews, 33 Tex. 112 ; Paris *v.* Mason, 37 Tex. 447 ; Texas & St. Louis R.R. Co. *v.* Matthews, 60 Tex. 215.

[b] 60 Tex. 76.

[c] Const. 1876, Art. 1, § 17.

Special benefits are allowed; general benefits are excluded.(a)

§ 1144. West Virginia.

1861–3. Art. 2, § 6. "Private property shall not be taken for public use without just compensation."

1872. Art. 3, § 9. "Private property shall not be taken or damaged for public use without just compensation; nor shall the same be taken by any company incorporated for the purposes of internal improvement until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporations, the compensation to the owner shall be ascertained in such manner as may be prescribed by general law: Provided, that when required by either of the parties such compensation shall be ascertained by an impartial jury of twelve freeholders."

Art. 11, § 12. "The exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking, by the legislature, of the property and franchises of incorporated companies already organized, and subjecting them to the public use, the same as of individuals."

In this State it is said to be well settled that the benefits, which may be considered, are confined to such as are direct and peculiar to the owner of the land, excluding those which he shares with other members of the community whose land is not taken.(b)

§ 1145. Old constitutions—New York.—In all except the foregoing jurisdictions, the language of the constitution is that property shall not be "taken" without just compensation, or is of similar import. In some of them the consideration of benefits is expressly excluded by the constitution, in others by statutes. We shall perhaps best understand the peculiar course of decision by confining

(a) Gulf C. & S. F. Ry. Co. *v.* Fuller, 63 Tex. 467.

(b) Railroad Co. *v.* Tyree, 7 W. Va. 693; Railroad Co. *v.* Foreman, 24 Ib. 662.

our attention at first to a single State where under a constitution of this kind, beginning with decisions upholding the rigid rule of *damnum absque injuriâ* and with a statute absolutely excluding benefits, the courts have on the one hand introduced consequential damages, and on the other found it impossible to give any longer full effect to the statute.

In New York the question of benefits was provided for by the Revised Statutes,(a) which enact that no allowance shall be made for any "real or supposed" benefits. The early interpretation of this clause and of its effect upon the measure of damages is seen in Albany Northern R.R. Co. *v.* Lansing.(b) The route of the plaintiff's road ran through defendant's land. The quantity taken was $\frac{60}{100}$ of an acre and the commissioners awarded the defendant $450. The defendant offered to prove that the land not taken would be greatly depreciated in its market value, by reason of the part taken *being used for railroad purposes;* also, that the buildings on the residue of the lot would be less desirable as a place of residence or business, *by reason of their proximity to the railroad, thus to run through the lot*, and their exposure to the noise, smoke, and other annoyances attending the passage of engines and trains; also, that the buildings would be exposed to be set on fire by sparks from the engines; also, that cattle and horses on the land adjacent to the track of the road would be liable to be frightened and injured by the passage of engines and trains; that it was difficult and unsafe to work teams on lands adjoining a railroad; that cattle were in danger, when crossing the track, of running along the track and being killed, and that the general value of a farm lot would, *in consequence of these inconveniences*, be diminished; also, that a railroad

(a) 2 R. S. 605.
(b) 16 Barb. 68.

through a farm is a great injury to it and to the general business and operations of a farm in this part of the country, and that the value of the farm generally is greatly diminished thereby. All this evidence the commissioners rejected, and they stated, as the rule by which they should be governed in determining the amount of compensation to be awarded to the defendant, that they should allow "*the full compensation for the land taken, including therein the damages to the adjacent land by reason of such taking, but that they should not allow consequential and prospective damages.*" Upon this principle they made their award. The defendant appealed. The following extract will show the view taken of the matter by the court:

"Nor do I think the commissioners have erred in the principle adopted by them as the basis of their appraisal. The subject of appraisal was 'the real estate proposed to be taken.' This they were required to view. It was in respect to this, that they were to hear the proofs and allegations of the parties. And then, as if to exclude all speculation as to the effect of the construction of the proposed road, they are prohibited from making any 'allowance or deduction on account of any real or supposed benefit which the parties may derive from such construction.' The obvious intention of the legislature was, to confine the commissioners to an estimate of the price to be paid by the railroad company to the owner upon this involuntary sale of his land, regardless of the benefits or injuries which might result to him as the owner of adjoining land, in consequence of the contemplated improvement. This legislative intent is, I think, very successfully embodied in the rule adopted by the commissioners.

"They certainly were not required to confine themselves to the actual, abstract value of the land to be taken, as though the owner would have no other lands left to be affected by it. Had they done this, their award would have been less than $100, for it was admitted upon the hearing that the average value of Mr. Lansing's land was $175 per acre. They were to consider how *the taking* of the land, but not *the use* of it, in any particular mode, would affect the residue of the owner's land. Would it leave that residue in an inconvenient, unmarketable shape? If so,

this fact might properly be taken into the account in determining the amount of compensation. Thus if the land to be taken should lie between the owner's house and the highway, the amount of compensation should be vastly more than for the same quantity of land equally valuable in itself, but situated in some remote part of the owner's premises. The commissioners, therefore, were right when they decided that they would include in the compensation for the land to be taken 'damages to the adjacent land by reason of *such taking*.' But the fact that the land to be taken would be used for a railroad, rather than any other lawful business, formed no part of the materials out of which the award was to be made. Whether the land taken was to be used for a railroad, or a garden, was a question, so far as compensation was concerned, with which the commissioners had nothing to do. Their duty was to award compensation for *the taking* of the land, and not for *the use* to which it should be applied, when taken. Nothing could be more unjust, in principle, than to prohibit the commissioners from considering the *benefits* which the owner of the land would derive from the construction of the road, and yet require them to consider what inconveniences or injuries might be the result of such construction." [a]

In this case we have what we have called the early rule explicitly stated. The taking is looked upon as the true cause of loss, and it is said that it makes no difference whether the land is taken for a railroad or a garden. If we turn to a subsequent leading case [b] we shall find the rule materially changed. The court says: "What is the value of the piece which is taken, and how much is the residue depreciated in its market value by the separation, and *by the construction of the railroad;* which two sums, added together, is the amount of compensation" to which the owner is entitled? In other words, "What is the market value of the whole land without the railroad, and what is the market value of the remainder of the piece with the railroad?" And it was

[a] Albany Northern R.R. Co. *v.* Lansing, 16 Barb. (N. Y.) 68, 70.
[b] Matter of Utica, C. & S. V. R.R. Co., 56 Barb. 456.

accordingly held that in the estimate of damages must be included exposure to fire, injury to access, and depreciation through noise, smoke, and increased danger.

It has also been said that the rule is the difference in value between what the property is worth without, and what it will be worth with the improvement.[a] And in one of the latest cases [b] in the Court of Appeals it is laid down that the rule is, *first*, the value of the land taken, and *second*, compensation for all the injury sustained through the improvement.

It is obvious that none of these rules wholly excludes benefits "real or supposed." But the first does it as nearly as may be. If attention is confined to the depreciation caused by the taking, no benefits would be allowed for which came from the *use of the improvement itself*, and this was no doubt the design of the statute. If it be said that benefits from the *taking* itself (as by leaving the parcel of land in an improved condition) were nevertheless to be taken into account, the answer is that it is not to be supposed that the legislature intended to guard against this, for we cannot ascertain the *damage* caused by a taking without allowing for benefits proceeding from the same cause. The object of the statute was that the exclusion of benefits should be a sort of offset to the burden imposed by the rule of *damnum absque injuriâ*.

The moment the market value of the land as affected by the improvement (*i. e.*, by the *use*) is resorted to as a standard, benefits intended by the statute to be excluded, are in some way or other allowed for, and now lest the

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[a] Matter of Furman St., 17 Wend. 649; Troy & Boston R.R. Co. *v.* Lee, 13 Barb. 169; People *v.* Eldredge, 3 Hun 541; Matter of New York, L. & W. Ry. Co., 27 Hun 151; Black River & M. R.R. Co. *v.* Barnard, 9 Hun 104.

[b] Henderson *v.* New York C. R.R. Co., 78 N. Y. 423, 433.

statute should be deprived of all force and effect, the distinction between general and special benefits is resorted to. In the first place, the land-owner may recover the full value of the *part taken*, notwithstanding its value may have been enhanced by the improvement, and then the enhancement in value of the part not taken, so far as it is due to general benefits, is to be disregarded, while special benefits must be allowed for. If we simply subtracted the value of the entire tract as it will be when affected by the improvement from the value of the entire tract as it stands at the time of the taking, we should get the real damages, which might of course be merely nominal, and in this way we should nullify at once the statute and the old rule with regard to consequential damages, so-called. The courts of New York have hesitated to take this extreme step, and still give some effect to the statute, although they have materially modified the rule on account of which the statute was enacted. We shall return to this subject again when we come to examine the decisions turning on the elevated railroad statutes.

§ 1146. **Kentucky.**—In Kentucky the land taken must be paid for without reference to benefits, and the measure of damages for this is the difference between the value of the entire tract (excluding the enhancement resulting from the contemplated improvement) and its value (still excluding the enhancement) after the appropriation of the part taken. Benefits both general and special may by statute be set off against the "incidental" damages, but not against the value of the part taken.(a)

(a) Sutton's Heirs *v.* Louisville, 5 Dana 28; Rice *v.* Danville, L. & N. T. R. Co., 7 Ib. 81; Jacob *v.* Louisville, 9 Ib. 114; Henderson & Nashville R.R. Co. *v.* Dickerson, 17 B. Mon. 173; Louisville & N. R.R. Co. *v.* Thompson, 18 B. Mon. 735; Louisville & N. R.R. Co. *v.* Glazebrook, 1 Bush 325; Elizabethtown & P. R.R. Co. *v.* Helm's Heirs, 8 Ib. 681.

Under these decisions the result reached in Kentucky is somewhat peculiar. The value is not estimated by determining the value of the strip taken for actual use, but its value when considered in its relation to the entire tract, which includes actual injury to improvements, and every *direct damage* tending to diminish in value the entire tract by reason of the use and appropriation of the strip for the purpose contemplated, the diminution in value of the entire tract being regarded as being as much a taking within the meaning of the constitution as the appropriation of the land on which the road-bed lies. When the owner is thus compensated, the ordinary inconvenience and damage that results from the operation of the road may be set off by the benefits and advantages.([a]) In Jeffersonville M. & I. R.R. Co. *v.* Esterle ([b]) the question of benefits when no land was taken, but the easements in a street were injured, was fully considered. The following extract will show the view taken in Kentucky:

"The measure of the damages which the appellee may recover, if entitled to recover at all, is the diminution in the value of his house and lot, occasioned by the location of appellee's tracks, and the uses to which they were authorized to put them by the grants from the city authorities.

"This seems to be the theory of the appellee, and also of the court below. But the rights of the appellants were prejudiced by the failure of that court to prescribe the rule by which the jurors were to estimate this diminution. If the location and operation of the roads in front of appellee's house diminished its value say twenty per centum, then the diminution should be proportioned to its value just preceding the time at which it became generally known that Fourteenth Street had been selected as the line of the road, for the reason that if the location of the road increased the value of the property, appellants

([a]) Asher *v.* Louisville & Nashville R.R. Co., 87 Ky. 391.
([b]) 13 Bush 667.

ought not to be required to pay appellee twenty per centum of the enhancement resulting therefrom. Upon the other hand, appellants contend that this supposed enhancement of vendible value is, or ought to be, a controlling element in the estimation of damages, and that if the house and lot of appellee had a greater vendible value immediately after the occupation of the street than it had immediately before, then there was no diminution, and nothing ought to be recovered. This rule is incorrect. The jury should ascertain what the value of the property was just before it became generally known that the appellant's roads were to be located in front of it, and then determine what proportion of that value was taken from the house and lot by the obstruction of the street, and the annoyances incident to the movement of engines and trains of cars along and over appellants' roads. This rule is simple, and it strips the question of the complication and confusion which must necessarily arise in an attempt to distinguish between the natural increase of the value of the particular piece of realty and the increase attributable to the location of the line of railway.

"Benefits arising directly from or out of an unauthorized act may sometimes be considered in the determination of the sum to be recovered by the injured party, but in all cases these benefits must be direct and immediate. They must be confined to the proximate consequences of the act complained of, and be of like kind with the opposite injuries for which the recovery is sought.

"In a case where land had been overflowed, by the erection of a mill-dam, the Supreme Court of Massachusetts aptly said, 'The damages are given only for the injury done to the land by flowing, and any reduction or set-off to that damage must consist of benefits arising from the same cause, that is, from flowing the land.' So in this case, if the railway affords appellee increased or additional facilities for ingress or egress to and from his house and lot, or for the movement of articles in which he may deal, or supplies which it is necessary he shall procure, this benefit may be taken into consideration in estimating the damages he has sustained. But supposed benefits arising from the increased general prosperity of the neighborhood, and the enhanced vendible value of real estate in the particular locality, even if it be a recognized incident to the location of the public work, are too remote and contingent to be taken into considera-

tion in the question of damages to appellee's houses and lot resulting from the special injuries to which he has been subjected. Such supposed benefits flow not immediately from the railways obstructing the street, nor from the movement of the cars over them, but from the investment of capital in a work of general public utility, and the enterprise and activity of persons attracted, and specially benefited by their proximity to the line of railways.

"These benefits and advantages the appellee shares in common with persons owning lands near enough to be influenced by the general prosperity, and yet not upon the immediate line of the roads, or not injuriously affected by the causes operating to his prejudice. And his right to be compensated for the special injuries he may sustain, cannot be denied him because of the mediate and consequential benefits resulting to him in common with the local community at large."

§ 1147. **Massachusetts.**—In Massachusetts special benefits only may be set off against both the value of the part taken and the damages to the remainder.[a] At the same time the benefit which accrues to the owner from the increase of the value of the residue of the lot is offset, notwithstanding that other lots in the immediate vicinity receive a similar benefit.[b]

In Massachusetts it has been held that in widening and laying out a street, the legislature may provide that

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[a] Commonwealth *v.* Coombs, 2 Mass. 489; Same *v.* Middlesex, 9 Mass. 388; Avery *v.* Van Deusen, 5 Pick. 182; Palmer Co. *v.* Ferrill, 17 Pick. 58; Meacham *v.* Fitchburg R.R. Co., 4 Cush. 291; Upton *v.* So. Reading Branch R.R. Co., 8 Cush. 600; Heard *v.* Middlesex Canal, 5 Met. 81; Farwell *v.* Cambridge, 11 Gray 413; First Church *v.* Boston, 14 Gray 214; Whitman *v.* Boston & Me. R.R. Co., 7 All. 313; Dorgan *v.* Boston, 12 All. 223; Whitney *v.* Boston, 98 Mass. 312; Chase *v.* Worcester, 108 Mass. 60; Allen *v.* Charlestown, 109 Mass. 243; Howe *v.* Ray, 113 Mass. 88; Upham *v.* Worcester, 113 Mass. 97; Green *v.* Fall River, 113 Mass. 262; Wood *v.* Hudson, 114 Mass. 513; Bancroft *v.* Boston, 115 Mass. 377; French *v.* Lowell, 117 Mass. 363; Hilbourne *v.* County of Suffolk, 120 Mass. 393; Parks *v.* County of Hampden, 120 Mass. 395; Clark *v.* Worcester, 125 Mass. 226; Cross *v.* Plymouth Co., 125 Mass. 557.

[b] Whitman *v.* Boston & Me. R.R., 3 All. 133.

the land shall be estimated at its value before the widening, and that such estimate shall not include the increased value occasioned by the improvement itself. The court said:

"Nor can we see any good reasons for including in the valuation an element not incident or appertaining to the property itself in the hands of the owner, but which it acquires only by the act which takes it from him and appropriates it to the public. Strictly speaking, the land taken is intrinsically worth to the owner only so much as its valuation would be as part of the entire tract or lot, irrespective of its proposed severance for the public use. It is difficult to understand how land is increased in value to the owner by a public improvement, which can be effected only by depriving him of its use. Certainly there is no principle of equity on which a party can rest a claim for damages for the loss of a benefit or profit which, from the very nature of the case, he never could have received or enjoyed." [a]

The same view seems to be taken in Missouri.[b]

§ 1148. **Other States—General conclusions.**—In Connecticut, in Nicholson *v.* New York & N. H. R.R. Co.,[c] special benefits were allowed. The case, however, was not one of eminent domain, but where a special statute required all damages to be paid for. No land was taken. Nichols *v.* City of Bridgeport [d] was a street-opening case, but both these cases seem to assume that it is a general rule that in all cases of taking, *special, local, or peculiar benefits* may be offset generally against the damages.

In Delaware the cases do not go into the distinction at

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[a] Dorgan *v.* City of Boston, 12 All. 223, 231.

[b] Pacific R.R. *v.* Chrystal, 25 Mo. 544; Hosher *v.* Kansas City, St. J. & C. B. R.R. Co., 60 Mo. 303.

[c] 22 Conn. 74.

[d] 23 Conn. 189; *acc.* Trinity College *v.* Hartford, 32 Conn. 452; Terry *v.* City of Hartford, 39 Conn. 286, which were also street-opening cases.

all, and can only be cited to the point that benefits may be offset.[a]

In Indiana the cases lay down the rule of *difference in value*. The statute makes no distinction between general and special benefits, and it would seem from the cases that only such benefits as enter into and by their effect diminish the *damages*, are taken into consideration.[b]

In Iowa it is held that a lot-owner cannot recover for consequential damages, *e. g.*, damages to access, for the proper construction of an embankment.[c] The measure of damages when land is taken is always the value of the land taken, and in addition damage to the remainder, if there is any. No benefits can be considered, and whether any other damages are to be given is a question for the jury.[d] Notwithstanding the fact that consequential damages are excluded, risk from fire is admitted as an element of damage.[e]

In Kansas the constitution (Art. 12, § 4) provides that in the case of a right of way appropriated "to the use of any corporation," full compensation must be first made or secured, "irrespective of any benefit from any improvement proposed by such corporation." Under this provision the consideration of benefits appears to be excluded from consideration altogether in the case of rail-

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[a] Whiteman's Ex. *v.* Wilmington & S. R.R. Co., 2 Harr. 514.

[b] McIntire *v.* State, 5 Blackf. 384; Vanblaricum *v.* State, 7 Blackf. 209; Indiana Central R.R. Co. *v.* Hunter, 8 Ind. 74; Sidener *v.* Essex, 22 Ind. 201; Hagaman *v.* Moore, 84 Ind. 496; Grand Rapids & I. R.R. Co. *v.* Horn, 41 Ind. 479; Ross *v.* Davis, 97 Ind. 79.

[c] Slatten *v.* Des Moines Val. Ry. Co., 29 Ia. 148. For negligent or improper construction it is held that he may recover the difference between the value of the property with the road as constructed, and its estimated value with the line properly constructed. Cadle *v.* Muscatine W. R. Co., 44 Ia. 11.

[d] Pingery *v.* Cherokee & Dak. Ry. Co., 78 Ia. 438.

[e] Ib. p. 443.

roads, in which case the measure of damages would be the value of the land taken and the injury to the remainder ; but in that of highways, special benefits may be set off both against the value of the part taken and damages to the residue.(a) In a very recent case,(b) a doubt is thrown out as to whether in Kansas, as in other States, "all proper benefits" might not be considered in estimating the damages to the remainder of the land not taken. But in Leroy & W. R.R. Co. *v.* Ross,(c) the authorities were reviewed and the conclusion reached that under such a provision as that of Kansas an instruction allowing special benefits was erroneous. The objection was made that the rule of damages adopted in Kansas,(d) of the *difference in market value before and after the improvement, must necessarily include benefits.* On this point the court said that if this rule permitted benefits, "we suppose the rule must give way to the provisions of the constitution." But they thought that the conflict was more theoretical than substantial. "The jury do not generally consider benefits," and even if the rule is incorrect,it was said that the railroad company could not complain of it because it was beneficial.

In Maryland the Court of Appeals expressly states in the leading case on the subject that no adjudication has yet been made decisively settling the question whether the legislature can set off benefits against the value of the land taken.(e) In Maryland the constitution forbids

(a) Harding *v.* Funk, 8 Kans. 315 ; St. Joseph & D. C. R.R. Co. *v.* Orr, 8 Kans. 419; Comrs. of Pottawatomie Co. *v.* O'Sullivan, 17 Kans. 58; Marcy *v.* Fries, 18 Kans. 353; Tobie *v.* Comrs. of Brown Co., 20 Kans. 14 ; Roberts *v.* Sams, 21 Kans. 247 ; Trosper *v.* Comrs. of Saline Co., 27 Kans. 391; Reisner *v.* Atchison, Union D. & R.R. Co.. 27 Id. 382.

(b) Wichita & W. R.R. Co. *v.* Kuhn, 38 Kans. 104, 675.

(c) 40 Kans. 598.

(d) Atchison, T. & S. F. R.R. Co. *v.* Blackshire, 10 Kas. 477.

(e) Shipley *v.* Baltimore & Potomac R.R. Co., 34 Md. 336. This case may

the legislature to pass any "law authorizing private property to be taken for public use without just compensation, as agreed upon between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation." Mr. Lewis, in his valuable work on Eminent Domain, cites Maryland as one of the States in which the courts hold that *special benefits only* may be set off against the damages to the remainder, but not against the value of the land taken. But he is not borne out by the cases which he cites.

In Minnesota special benefits only may be set off against both the value of the part taken and the damage to the residue.(a) The benefit is limited to the land affected.(b) The owner gets the market value of land taken at the time of the taking; but this cannot be increased by directing the jury to estimate the value on the hypothesis that the railroad is located near to, but not upon the property.

In Mississippi the measure of damages has been held to be the difference between the value of the property before the appropriation and after the appropriation, charging the owner, however, with nothing on account of the enhanced value of his land by reason of the improvement.(c)

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also be cited to the point that the land-owner cannot be charged with the general benefits which he shares in common with the community at large.

(a) Winona & St. P. R.R. Co. *v.* Denman, 10 Minn. 267; Winona & St. P. R.R. Co. *v.* Waldron, 11 Minn. 515; Carli *v.* Stillwater & St. P. R.R. Co., 16 Minn. 260; Weir *v.* St. Paul S. & T. F. R.R. Co., 18 Minn. 155; Simmons *v.* St. Paul & Chicago Ry. Co., 18 Ib. 184; Grannis *v.* The same, Ib. 194; Colvill *v.* St. Paul & C. Ry. Co., 19 Minn. 283; St. Paul & S. C. R.R. Co. *v.* Murphy, 19 Minn. 500; Arbrush *v.* Oakdale, 28 Minn. 61; Blue Earth Co. *v.* St. Paul & S. C. R.R. Co., Ib. 503; Whitely *v.* Mississippi Water Power & Boom Co., 38 Minn. 523.

(b) Minnesota Val. R.R. Co. *v.* Doran, 17 Minn. 188.

(c) Sullivan *v.* Lafayette Co., 61 Miss. 271.

In Nevada particular benefits are set off against the value of land taken and damages to the remainder, and the measure of damages is the difference in value of the property with and without the improvement.(a)

In New Hampshire the rule is that special benefits only may be deducted from the value of the part taken and the damages to the remainder.(b)

In New Jersey the rule appears to be that it is within the power of the legislature to provide for an offset of particular benefits against both the value of the part taken and the damages to the remainder; but that if the legislature do not so provide, benefits cannot be considered. This seems to leave the question of what is "just compensation" to a large extent to legislative discretion. This doctrine appears to be peculiar to New Jersey.(c)

In North Carolina there is no constitutional provision, nevertheless the courts hold that private property cannot be taken except upon just compensation. The general rule of law is that special benefits only may be set off against both the value of the part taken and the damages to the remainder.(d)

In Ohio, by the constitution of 1851, the land-owner must be compensated irrespective of any benefit.(e) Before the adoption of this constitution, benefits were off-

(a) Virginia & Truckee R.R. Co. *v.* Henry, 8 Nev. 165.

(b) Petition of Mt. Washington Road Co., 35 N. H. 134; Carpenter *v.* Landaff, 42 N. H. 218; Adden *v.* White Mts. N. H. Railroad, 55 N. H. 413.

(c) Carson *v.* Coleman, 11 N. J. Eq. 106; State *v.* Miller, 23 N. J. L. 383; Matter of Application for Drainage, 35 N. J. L. 497; Swayze *v.* N. J. Midland R.R. Co., 36 N. J. L. 295; Loweree *v.* Newark, 38 N. J. L. 151; Baldwin *v.* Newark, 38 N. J. L. 158.

(d) Freedle *v.* North Car. R.R. Co., 4 Jones L. 89; Comrs. of Asheville *v.* Johnston, 71 N. C. 398; Raleigh & Augusta Air Line R.R. Co. *v.* Wicker, 74 N. C. 220; State *v.* Lyle, 100 N. C. 497.

(e) Const. Ohio, Art. 13, § 5.

set, but the distinction between general and special benefits does not seem to have been adverted to.[a] In Little Miami R.R. Co. *v.* Collett[b] the question was raised whether even under such a provision special benefits would not be offset against damages to the remainder. But the point was not passed upon. Such a construction would seem to override the express words of the constitution.

In Oregon the rule is the difference in value.[c] The statute relating to benefits excludes those of a general character.[d]

In South Carolina the constitution of 1868 (Art. 12, § 3) provides that benefits shall not be offset. Prior to this, general benefits, and especially the enhancement in value caused by the improvement, were allowed for specifically.[e]

In Tennessee the courts hold that the "just compensation" of the constitution means only the actual value of the land taken, without regard to incidental benefits or damages; but that the legislature may provide for setting off special benefits against special damages.[f] But in a suit for damages by change of grade, benefits both general and special may be set off.[g]

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[a] Symonds *v.* Cincinnati, 14 Ohio 147; Brown *v.* Same, 14 Ohio 541; Columbus, P. & I. R.R. Co. *v.* Simpson, 5 Ohio St. 251; Kramer *v.* Cleveland & Pittsburgh R.R. Co., 5 Ohio St. 140; Platt *v.* Pennsylvania Co., 43 Ohio St. 228.

[b] 6 Ohio St. 182.

[c] Putnam *v.* Douglas Co., 6 Oregon 328.

[d] Oregon R. & N. Co. *v.* Owsley, 13 Pac. R. 186.

[e] Greeneville & Columbia R.R. Co. *v.* Partlow, 5 Rich. L. 428; White *v.* Charlotte & So. Car. R.R. Co., 6 Rich. L. 47.

[f] Woodfolk *v.* Nashville & C. R.R. Co., 2 Swan 422; East Tennessee & Va. R.R. Co. *v.* Love, 3 Head 63; Memphis *v.* Bolton, 9 Heisk. 508; Paducah & M. R.R. Co. *v.* Stovall, 12 Heisk. 1; Mississippi R.R. Co. *v.* McDonald, Ib. 54.

[g] Chattanooga *v.* Geiler, 13 Lea 611.

In Virginia the general rule appears to be the same as in Tennessee.(a)

In Vermont the rule is that peculiar benefits may be offset against the value of the land and the damages to the residue.(b) The rise of real estate resulting from the building of a railroad is a general benefit.(c)

The Wisconsin rule is that the land taken must be paid for in money, and that the government cannot speculate upon conjectural benefits, nor the owner upon the enhancement in value after the improvement is carried out; but that special benefits may be set off against special damages.(d)

Upon the whole, from a consideration of the course of decision in the various States, the following is perhaps a fair deduction:—1st. Benefits which proceed from the same *cause* as that which is treated as the cause of the damages, cannot be excluded. 2d. To give full force and effect to a statutory or constitutional exclusion of benefits, benefits in all other cases should be excluded. 3d. Wherever the measure of damages is held to be the difference in value of the land affected and unaffected, benefits intended by the statute to be excluded, will be included.

(a) Mitchell *v.* Thornton, 21 Gratt. 164; James River & Kanawha Co. *v.* Turner, 9 Leigh 313.

(b) Adams *v.* St. Johnsbury & L. C. R.R. Co., 57 Vt. 240.

(c) Ibid. Citing Childs *v.* New Haven & N. Co., 133 Mass. 253.

(d) Robbins *v.* Milwaukee & Horicon R.R. Co., 6 Wis. 636; Chapman *v.* Oshkosh & M. R.R. Co., 33 Wis. 629; Neilson *v.* Chicago M. & N. Ry. Co., 58 Wis. 516; Washburn *v.* Milwaukee & L. W. R.R. Co., 59 Wis. 364.

CHAPTER XXXVIII.

GENERAL CONSIDERATIONS AFFECTING THE MEASURE OF DAMAGES UNDER STATUTES OF EMINENT DOMAIN.

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§ 1149. **Difference in value—Prospective estimate.**—The rule laid down for the guidance of juries in condemnation proceedings must vary somewhat, according to the terms of the particular statutory or constitutional provision to be applied. As in all cases of trespass or injury to real property, the fundamental inquiry is the amount of injury done or the depreciation in the value of the whole caused by the act complained of. The

act complained of here is a "taking" under the statute or else some damage short of a taking. For the land taken or injured, where the statute permits damages to be given, the owner is to receive compensation. What that compensation is to be, the circumstances of each particular case must of course determine. But it is in all cases to be compensation; the actual value of the land taken, or the actual injury done; in the case of land taken, what disinterested third parties would pay for the land taken, under the various conditions in which the question of value may arise. "In making appraisals of this kind," says Harris, J., in Troy & Boston R.R. Co. *v.* Lee,(a) "the true rule, the only rule which will do equal justice to all parties, is to determine what will be the effect of the proposed change upon the market value of the property. The proper inquiry is, what is it now fairly worth in the market, and what will it be worth, after the improvement is made." To the same effect Bronson, J., in the Matter of Furman Street, says: (b) "The question is not, what estimate does the owner place upon it (the land), but what is its real worth in the judgment of honest, competent, and disinterested men. . . . . The proper mode of adjusting the question of damages is to inquire, what is the present value of the land, and what will it be worth when the contemplated work is complete."(c)

(a) 13 Barb. 169, 171.

(b) 17 Wend. 649, 670, 671.

(c) Sidener *v.* Essex, 22 Ind. 201; Matter of N. Y. C. & H. R.R. Co., 6 Hun 149; Del., Lackawanna & West. R.R. Co. *v.* Burson, 61 Penn. St. 369; Hornstein *v.* Atlantic & Gt. W. R.R. Co., 51 Penn. St. 87; Pittsburg, Va. & Ch. R.R. Co. *v.* Rose, 74 Penn. St. 362; Mix *v.* Lafayette, B. & M. R. Co., 67 Ill. 319; Haslam *v.* Galena & S. W. R. Co, 64 Ill. 353; Page *v.* Chicago, M. & St. P. R. Co., 70 Ill. 324; Eberhart *v.* the same, Ibid. 347; St. Louis, V. & T. H. R. Co. *v.* Haller, 82 Ill. 208; Springfield & M. Ry. *v.* Rhea, 44 Ark. 258.

§ 1150. **Principle one of compensation.**—Compensation is made not for the advantage to those taking, but for the detriment to the land-owner. Thus where a railroad, after expending a large sum of money in a rock cutting and filling with culverts, abandoned the enterprise, and a new company appropriated the same, it was held that a purchaser could not recover for the value or benefit *to the company* of the cutting, etc., but only for the difference in the marketable value of the whole property.(a)

§ 1151. **Time at which damages are measured.**—When we speak of the difference in value of the property without and with the improvement as the measure of damages, or, as it is often put, the difference in value *before* and *after* the improvement, it must be remembered that the value of the property might be affected by other causes.(b) The damages are usually to be estimated as of the time of taking.(c) In Minnesota, where an action for trespass is brought by the land-owner, the defendant may, by statute, convert the proceeding into one for condemnation. Damages are then assessed as of the time of trial, in accordance with the general rule.(d) In Wisconsin the settled rule is that the date

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(a) Black River & M. R.R. Co. *v.* Barnard, 9 Hun 104.

(b) Gregg *v.* The Mayor, etc., of Balto., 56 Md. 256; Mayor, etc., of Balto. *v.* Black, 56 Md. 333.

(c) Old Colony R.R. Co. *v.* Miller, 125 Mass. 1; Pitkin *v.* Springfield, 112 Mass. 509; Cobb *v.* Boston, 109 Mass. 438; Stafford *v.* Providence, 10 R. I. 567; Selma R. & D. R. Co. *v.* Keith, 53 Ga. 178; Calumet R. Ry. Co. *v.* Moore, 124 Ill. 329; Wier *v.* St. Louis, F. S. & W. R.R. Co., 40 Kas. 130; San José, etc., R.R. Co. *v.* Mayne, 83 Cal. 566.

(d) County of Blue Earth *v.* St. Paul & S. C. R.R. Co., 28 Minn. 503; Morin *v.* St. Paul, M. & M. Ry. Co., 30 Minn. 100. There seems, however, to be no reason why, the nature of the action having been changed by the defendant, the plaintiff should not be permitted to maintain a new action for the previous trespass and damages.

of the appraisement by commissioners governs, and not that of the first entry or location.([a])

§ 1152. **New damage from change in construction—Splitting damages.**—In an original proceeding to condemn land the measure of damages is usually the difference between the value of the land as a whole before and after the construction. If after damages have been assessed a change in the plan of construction, involving further damages, is made, the owner is entitled to a new assessment, and the measure of damages then becomes the amount of the increased damage.([b])

In Iowa, under a constitutional provision excluding benefits from consideration, it has been held that on relocation of a road the measure of damages is not the difference between the value of the land after the change, and its value before—for this would admit benefits—but the difference between the damages for the former location and the present one, taking into consideration the fact that the old road is given up, and that the land included in it reverts to the owner. If the former was greater than the latter, nothing can be given.([c])

A different question is presented, however, in the ordinary case of additions to or improvements of construction. The whole theory of condemnation proceedings is founded on the idea that damages are to be assessed once for all, and hence the general rule is that no further damages can be recovered. Thus, in Indiana it has been held that where a railroad runs through a street, and the damages have been assessed and paid, there cannot be a further recovery of damages by reason of the location of a side

([a]) Lyon *v.* Green Bay & M. Ry. Co., 42 Wisc. 538; Laflin *v.* Chicago W. & N. R. Co., 33 Fed. R. 415.

([b]) Wabash, St. L. & P. Ry. Co. *v.* McDougall, 126 Ill. 111.

([c]) Israel *v.* Jewett, 29 Ia. 475; Jewett *v.* Israel, 35 Ia. 261.

track or switch, as an additional burden, not included in the original appropriation.(a) And so in Michigan.(b) And where an owner consents to the building of a railroad, and thereafter condemnation proceedings are had, he must present all his claims in them. He cannot split his demand and reserve part; *e. g.*, the damage for the annual use prior to the condemnation.(c) Where a railroad was substituted for a plank-road, it was held in Vermont (d) that there could be no further recovery, for the road was common to all; but damages might be recovered on account of the owner's being compelled to build a private road to take its place.

§ 1153. **Damage from other causes excluded.**—Where the land-owner's property is depreciated in value, many causes may have contributed to this result. The only cause, however, that the jury is entitled to consider in a condemnation proceeding is the taking for the purpose in question. Thus, in Colorado it has been held that an instruction to the effect that the jury cannot justly assess any damages against defendant which have resulted from *any other cause* than the construction, maintenance, or operation of defendant's railroad, is proper.(e)

§ 1154. **Entire tract.**—In assessing damages or benefits the inquiry is limited to the tract of land immediately affected. This is held to be so much as belongs to the proprietor whose land is taken, and is continuous with it, and used together for a common purpose.(f) Thus,

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(a) White *v.* Chicago, St. Louis & P. R.R. Co., 122 Ind. 317.

(b) Barnes *v.* Michigan Air Line Ry. (Mich.), 32 N. W. 426.

(c) Harlow *v.* Marquette, H. & O. R.R. Co., 41 Mich. 336.

(d) Brainard *v.* Missisquoi R.R., 48 Vt. 107.

(e) City of Denver *v.* Bayer, 7 Col. 113; Denver & R. G. Ry. Co. *v.* Schmitt, 11 Col. 56.

(f) Kansas Central Ry. Co. *v.* Allen, 24 Kans. 33; *Re* New York, Lacka-

property used together as a farm is to be regarded as one tract, though it may consist of several government subdivisions, or be divided into separate parts by roads.(a) When land is divided into blocks by the owner, and dealt with as such by himself and purchasers, it is held that each block is to be considered as a separate tract in estimating damages.(b) And where several parcels of land are held under one lease and used for one business, it is proper to consider the injury to the property as a whole caused by taking one or a part of one of the parcels.(c) On this principle benefits to a piece of land through which the railroad does not run, cannot be set off against damages to another parcel through which it does run.(d)

In Beronio *v.* Southern Pacific R.R. Co.(e) it was held that a judgment for damages to an owner of an abutting lot, caused by the construction of a railway in the street, is a bar to an action for damages to another lot owned by the same person, distant two hundred and sixty feet from the first lot, arising from the same cause, and accruing at the same time, and prior to the filing of the complaint in the first action ; the court holding that in cases of tort, the question as to the number of causes of action which the same person may have turns upon the number of torts, and not upon the number of different parcels of land which may have been affected thereby. Each separate tort gives a separate and single cause

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wanna & W. Ry. Co. *v.* Arnot, 27 Hun 151 ; Ham *v.* Wisconsin, I. & N. Ry., 61 Ia. 716; Fayetteville & L. R. Ry. Co. *v.* Hunt, 51 Ark. 330.

(a) Reisner *v.* Atchison U. D. & R.R. Co., 27 Kans. 382.

(b) Todd *v.* Kankakee & I. R.R. Co., 78 Ill. 530.

(c) *Re* New York, W. S. & B. R. Co. *v.* Bell, 28 Hun 426, citing Henderson *v.* N. Y. Central R.R. Co., 78 N. Y. 423.

(d) Todd *v.* Kankakee & I. R.R. Co., 78 Ill. 530.

(e) 86 Cal. 415.

of action, and whenever by one act a permanent injury is done to several pieces of property, the damages are assessed once for all, and the cause of action is wholly merged in a recovery of damages for injury to one of the parcels.

This question is one in great measure of fact, and each case must consequently turn more or less upon its own circumstances. If the parcels of land affected are held under one title for a common use, the application by the California court of the familiar doctrine that damages for a single tort cannot be divided seems proper. But lots on a city street may or may not be so held.

§ 1155. **Where whole estate is taken.**—Where the whole of the owner's fee simple estate in land is taken, the measure of damages is the value of the land at the time of taking.(a) It is frequently the case, as in the exercise of the right of eminent domain by railroads, that only an easement is taken, *e. g.*, a right of way. In appraising damages for taking such a right, the possibility of reverter through a discontinuance of the use is supposed to be allowed for.(b) Where the possibility of reverter, as in general, has no known value, the owner receives the market value of the land.(c)

§ 1156. **Interest less than fee.**—In all cases where the person who seeks redress has an interest less than the fee, he recovers the damages proportioned to his title. All the circumstances relating to his possession and title must be inquired into. So a settler upon the public

(a) San Francisco, A. & S. R.R. Co. *v.* Caldwell, 31 Cal. 367; Hollingsworth *v.* Des Moines & St. L. Ry., 63 Ia. 443; Gardner *v.* Brookline, 127 Mass. 358; Springfield & M. Ry. *v.* Rhea, 44 Ark. 258; Brown *v.* Beatty, 34 Miss. 227; Chapman *v.* Oshkosh & M. R. R.R. Co., 33 Wis. 629.

(b) Newville Road Case, 8 Watts 172.

(c) Hollingsworth *v.* Des Moines & St. L. Ry. Co., 63 Ia. 443; Railway *v.* Combs, 51 Ark. 324.

lands who has made a homestead entry, or the owner of a timber culture claim, recovers damages for the diminished value of his interest in the land, and not for the diminished value of the land itself.(a) "The claimant's interest in the land may, under some circumstances, be worth as much as the land itself, while, under other circumstances, it may be worth scarcely anything; and the claimant may, under some circumstances, be entitled to recover for the diminished value of his interest in the land an amount as great as though he had a full and complete title to the land, while under other circumstances he may not be entitled to any considerable amount." (b) The recovery may be in gross, or separately, according to the interest shown. This is a matter of statutory regulation. Where provision is made for separate recovery, the claimant recovers the true and actual value of his interest, whatever it is.(c) Thus the life-tenant and remainderman may each recover, the one for the injury to his life estate, the other for that to the reversion.

§ 1157. **Leasehold interest.**—When a leasehold interest is taken, the measure of damages to the tenant is the actual value of the lease, including loss or depreciation of tenant's fixtures, reasonable cost of removal and refitting in new quarters, and injury to business during the period of interruption. The landlord's damages are the value of the rent and the reversion.(d)

(a) Ellsworth, M. N. & S. R.R. Co. *v.* Gates, 41 Kas. 574; Chicago, K. & W. R.R. Co. *v.* Hurst, Id. 740.

(b) Chicago, K. & W. R.R. Co. *v.* Hurst, 41 Kas. 740, 743. *Acc.* Red River & L. W. R.R. Co. *v.* Sture, 32 Minn. 95.

(c) Colorado C. R.R. Co. *v.* Allen, 13 Col. 229.

(d) Atchison, T. & S. F. R.R. Co. *v.* Schneider, 127 Ill. 144; Edmands *v.* Boston, 108 Mass. 535; *Re* William and Anthony Sts., 19 Wend. 678; Dyer *v.* Wightman. 66 Pa. 425.

§ 1158. **Fee subject to restrictions.**—When the fee is taken, but it is subject to restrictions, the question is simply whether the restrictions qualify its value or do not. If they do not, the owner recovers the full value.(a) So in a Massachusetts case (b) it was held that the fact that there was a restriction on the property as to the height of the building to be erected thereon, and that it must be a dwelling-house only, should be considered in estimating the value.

§ 1159. **Unlawful entry—New proceedings.**—Damages may be caused by an unlawful entry, previous to condemnation proceedings, and the question often arises how far any damages for this trespass is to be taken into account in the award. Of course the owner may recover in a separate action of trespass whenever the tort is entirely independent of the condemnation proceeding.(c) And so it has been held that a railroad is responsible in damages for injury done in preliminary surveys.(d) So it has been held in Pennsylvania that a tenant to whom land is leased even after the location of a railroad, and with notice of it, may recover for the destruction of his growing crops planted before he had notice of the time when his possession would be terminated.(e) As to such cases it would not seem that there is any difference under the provisions of the new constitutions authorizing an action for *injury*; though such an inference might be drawn from the head-note of a recent

(a) Chandler *v.* Jamaica Pond A. Co., 125 Mass. 544; First Parish in Woburn *v.* Middlesex County, 7 Gray 106; Matter of Albany St., 11 Wend. 149; Chicago E. & L. S. R.R. Co. *v.* Catholic Bishop, 119 Ill. 525; Matter of Ninth Ave., 45 N. Y. 729.

(b) Allen *v.* Boston, 137 Mass. 319; *acc.* Central L. Co. *v.* Providence, 15 R. I. 246.

(c) Bethlehem South G. & W. Co. *v.* Yoder, 112 Pa. 136.

(d) Galveston, H. & S. A. R.R. Co. *v.* Pfeuffer, 56 Tex. 66.

(e) Lafferty *v.* Schuylkill R. E. S. R.R. Co., 124 Pa. 297.

Pennsylvania case.[a] In that case the attempt was made to prove an injury from the location of a road through a street in front of the premises in question. The court said: "There was no taking of any portion of the plaintiff's property. The plaintiff's ancestor was not injured by the setting of construction stakes in a public highway."[b] The only question in such case is, has there been any actual injury.

Like all actions for injury to the possession of real estate, such an action must be brought by the owner who was in possession at the time of the trespass, and the right of action does not pass to a grantee of the estate.[c] So when a railroad or other public work is constructed through private property, and the condemnation proceedings turn out to be invalid, the owner will have his action of trespass. It has been held in Maryland that under such circumstances exemplary damages may be recovered if the act is malicious or oppressive; that plaintiffs cannot recover as damages in trespass, *q. c. f.*, *compensation for the use of the tracks*, upon the assumption that they were the owners of them.[d]

When the assessment of damages is made at and of the date of the original entry, all damages must necessarily be included in the award. But when the assessment is made as of the time of filing the award, as in Minnesota, it seems that the commissioners cannot give damages for the occupation of the land previous to the award; though if it appears on the face of the award that they have done so, this will bar a subsequent action of trespass.[e]

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[a] Penna. S. V. R.R. Co. *v.* Ziemer, 124 Pa. 560.

[b] Ib. p. 570.

[c] Furbush *v.* Goodwin, 25 N. H. 425; May *v.* Slade, 24 Tex. 205.

[d] Baltimore & O. R.R. Co. *v.* Boyd, 63 Md. 325; see further S. C. 67 Md. 32.

[e] Leber *v.* Minneapolis & N. Ry. Co., 29 Minn. 256.

Railroad companies frequently begin new condemnation proceedings when those already taken have failed. In such cases the right to recover for injury done through the void proceedings is extinguished and disappears when subsequent valid proceedings are taken. In a case of this sort Cooley, J., said that if the owner sold the land to a third person, his right of action would be unaffected, "for the injury was already inflicted, and the injurious consequences which had resulted, or were likely to result, would be taken into account in determining the price."(a)

§ 1160. **Discontinuance and abandonment.**—As a general rule it has been held that the right to discontinue is absolute, and the property may be abandoned without incurring any liability for damages. The ground of this is said to be that those instituting condemnation proceedings have a reasonable time after ascertaining the expense to decide whether to take or not.(b) But there is no doubt that great injustice is often suffered in this way; for while the proceedings are pending, the land may be rendered unavailable for any purpose, and the owner deprived of the opportunity either of renting or selling. To meet this difficulty the court sometimes imposes terms, and in some cases special statutes provide for indemnity. Thus in New York where the legislature authorized the laying out of a military parade ground in New York, and after several years the proceedings were discontinued by another act, the market value meantime having fallen, it was held by the Supreme Court of New York,(c) that the measure of damages under a special act authorizing commissioners to determine the "loss and

(a) Dunlap *v.* Toledo, A. A. & G. T. Ry. Co., 50 Mich. 470, citing McFadden *v.* Johnson, 72 Penn. St. 335.

(b) See the cases collected in Lewis on Em. Dom., ch. xx.

(c) Matter of Munson, 29 Hun 325, 339.

damage, legal and equitable, if any," was the depreciation in market value between the date of the filing of the map, and the date of the second act, deducting, however, from the original value any appreciation caused by the improvement itself. Barrett, J., said, in delivering the opinion of the court: "The city practically took their property away from them when it had one market value. It returned it to them when it had another and lower market value. Under an act which left it to the commissioners and the court to do 'equity' in the matter, the difference is the fair and just measure of compensation."

By a statute in Massachusetts provision is made that when there is no entry, and the proceedings are abandoned, the owner shall be indemnified for all *trouble and expense* to which he has been put by the proceedings. Under this statute it has been held that the word "trouble" refers to trouble from which some material pecuniary injury results, involving labor and the expenditure of time, or occasioning inconvenience to the owner in the use and occupation of the land, and not to mental trouble, vexation, disquietude, annoyance, or uncertainty.[a]

§ 1161. **Hypothetical reduction of damages not allowed.**— In the application of the statutory rules, regard must be of course had to the principles which forbid the allowance of damages which are conjectural, remote, or uncertain. In the same way, damages cannot be reduced by conjectures as to probability. Thus in Massachusetts it has been said, where all the waters of a pond were taken, that the respondent could not show in reduction of damages that only a part would probably used,[b] and the court said:

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[a] Whitney *v.* Lynn, 122 Mass. 338.
[b] Howe *v.* Weymouth, 148 Mass. 605.

"If a parcel of land should be cut off by a railroad, the fact that the railroad company had prepared a crossing over its road for access to such parcel, and intended to maintain it, or the probability that a highway would be laid out over the railroad which would give access to the land, might affect the market value of the land cut off, but could not be put in evidence by the railroad company in mitigation of damages."([a])

§ 1162. **Enhanced value.**—The value of the land which the owner recovers does not mean the value as it may be *hereafter* enhanced by the improvement, but as it stands at the time of the taking.([b]) This may be an enhanced or a diminished value. As we have seen in considering the question of benefits, all effect of the improvement is to be disregarded. Thus it is error to instruct the jury to consider what the value of the property would be if the railroad was not on it, but were in the immediate neighborhood.([c]) If it were in the immediate neighborhood, it might enhance or it might diminish the value. The enhancement, if any, will be included in the market value, and the owner will thus get the enhancement without any hypothesis as to the location of the road elsewhere.([d]) And so when there is no current market rate, the value cannot be ascertained by speculations as to how much

([a]) See Brown *v.* Worcester, 13 Gray 31; Old Colony R.R. *v.* Miller, 125 Mass. 1.

([b]) Railroad Co. *v.* Tyree, 7 W. Va. 693. This question was much argued in Stafford *v.* Providence, 10 R. I. 567, and it was held that the value at the time of the taking must govern, however much previous taking of other property for the same improvement might have enhanced it. In Louisiana, on the other hand, the law provides that the assessment is to be made on the basis of the value *before the contemplated work had produced any effect upon it.* New Orleans P. Ry. Co. *v.* Murrell, 34 La. Ann. 536.

([c]) Morin *v.* St. Paul, M. & M. Ry., 30 Minn. 100.

([d]) Cobb *v.* Boston, 112 Mass. 181.

the proposed improvement will increase it. Thus where land is taken for a dam and reservoir, the Supreme Court of California has held that the defendants are not entitled to any benefit arising from the improvement upon the adjoining land, for the purposes of which their land is taken. The following extract will show the distinction:

"This seems to us inadmissible as a direct element of value. It is possible that they might get some benefit from it indirectly. That is to say, the public knowledge of a proposed improvement might cause an actual demand in the market and a subsequent advance in the current rate of price. In such case it would be impracticable for a court to analyze the price and determine the proportion in which any particular element contributed thereto. The scales of justice do not balance quite so delicately as that. But aside from this indirect benefit, and in a case where there is no actual current rate of price, and where in consequence the court must arrive at the value from a consideration of the uses to which the property may be put, it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land." (a)

And the court points out that such a course would result not merely in *not charging the benefit against the owner* (which is the object of all the benefit statutes), but in *crediting it in his favor*, or in effect of *charging those making the improvement with it;* and it adds that anything in other decisions which seems to countenance such a view must come from overlooking the distinction between an indirect benefit arising from a natural increase in the market price consequent upon a public demand, and cases where there is no actual market price, and the value must be got at by a consideration of the purposes for which the property is suitable. And *a fortiori* it was incompetent to allow witnesses to base their

(a) San Diego L. & T. Co. *v.* Neale, 78 Cal. 63, 74.

estimate of value upon benefits expected to result from *adjacent* lands.(a)

§ 1163. Elements entering into the measure of damages.— The measure of damages must not be confounded with the elements of damage, evidence of which is admitted for the purpose of enabling the jury to apply the rule. Thus in a case where bridge property was taken under a statute, the defendant contended that the measure of damages was the cost of constructing a new bridge like the one taken. But the Supreme Court of Pennsylvania said that this would substitute "one of the elements of damage for the measure of damages itself."(b) The measure of damages in condemnation proceedings, stated in one of its most general forms, is *the depreciation in value of the property*, for this is the same as the *amount of injury* to it. The value is most easily measured by the market, when there is one. Consequently, as we have seen, the rule with which we most commonly meet is *the difference between the market value* of the property as affected and as unaffected by the improvement, or before the improvement, and as it will be after the improvement is completed. As a general rule, under any head of the law, where the measure of damages is determined by a difference in market value, it cannot be a matter of any consequence of what elements this is made up, and evidence giving the market value before and after the injury would be quite sufficient. And in practice, as in the case of sales or contracts of carriers, when the question at issue relates to articles of personal property for which there is a constant market, there is not found to be much difficulty in applying the rules. Land, however, has in many cases a very indeterminate market value, especially

(a) Ib., p. 75; *acc.* Kerr *v.* South Park Comrs., 117 U. S. 387.
(b) Montgomery Co. *v.* Schuylkill Bridge Co., 110 Pa. St. 54.

farming or wild land, such as is involved in perhaps the greater number of condemnation proceedings. Hence it has become the practice to take evidence not only directly as to the market value, but as to every element which enters into it, and tends to diminish it.

The two most common species of proof in condemnation proceedings are—1st, the elements of Value; and 2d, the elements of Damages. Under the first head is admitted everything which has a bearing on the value of the property; under the second, everything which enters into and makes part of the damage inflicted. These elements of damage and value are neither the measure of damages, nor are they allowed as specific items of damage. They go to the jury only to throw light on the general question of depreciation.

In a recent case in Pennsylvania,(a) the Supreme Court of that State said:

"Merely speculative damages cannot be allowed. The inconvenience arising from a division of the property, or from increased difficulty of access, the burden of increased fencing, the ordinary danger from accidental fires to the fences, fields, or farm buildings, not resulting from negligence, and generally all such matters as, owing to the particular location of the road, may affect the convenient use and future enjoyment of the property, are proper matters for consideration; but they are to be considered in comparison with the advantages only as they affect the market value of the land. The jury cannot include in the verdict a fund to cover the costs of fencing, or to provide an indemnity against losses by fire, or casualties to the cattle and stock upon the farm. Such an assessment must necessarily be purely speculative, as the matters thus sought to be provided against are in their nature altogether ideal and fanciful. A rearrangement of the farm may obviate the necessity for any

(a) Pittsburgh, Bradford & Buffalo Ry. Co. *v.* McCloskey, 110 Pa. St. 436, 442; *acc.* Weyer *v.* Chicago W. & N. R.R. Co., 68 Wis. 180; Centralia & Chester R.R. Co. *v.* Brake, 125 Ill. 393; City of Denver *v.* Bayer, 7 Col. 113.

increased fencing; its future occupancy may be such as to require none; casualties, by fire or otherwise, may never occur, and therefore the injury from those causes can only be computed as they affect the market value of the land."

§ 1164. **General nature of inquiry.**—As a general thing, therefore, where the rule laid down is the depreciation in market value, testimony tending to show the selling value of the property as affected by and as unaffected by the railroad or other improvement is the method of proof resorted to. But this is not exclusive of the other methods already referred to. Thus, where the plaintiff was a tenant of leasehold property, and precluded from using it otherwise than as a coal-yard, and the enjoyment of his estate required that appliances which had been rendered useless by the entry of the defendant company should be reconstructed at an elevation which increased the cost of raising and storing the coal, and increased the breakage and waste of handling it, it was held by the Supreme Court of Pennsylvania that these matters were properly received in evidence, *not as specific items of claim, but as affecting market value.*[a] And so of the cost of fencing.[b] In the case of farm lands, the value is affected by a variety of causes. The property may be divided into parcels of inconvenient shape or size, facilities of access may be impaired, fields may be exposed so as to require new fencing, the risk of fire to farm buildings may be increased from sparks from passing engines; all these are elements of damage which may affect the value of the property, and are proper for the consideration of the jury. Thus, in Missouri P. Ry. Co. *v.* Hays,[c] it was held proper to consider the way in which the railway divided

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[a] Kersey *v.* Schuylkill River E. S. R. Co., 133 Pa. 234.
[b] Curtin *v.* Nittany V. R. Co., 135 Pa. 20.
[c] 15 Neb. 224.

the land, the inconvenient shape in which the part not taken was left, and the exposure to particular injuries from the proximity of a railroad. In Pittsburgh, Va. & C. Ry. Co. *v.* Bentley ([a]) it was held that evidence might properly be admitted of danger of fire from locomotives, of increased difficulties of access and inconvenience caused by a cut through land, of the way in which the shape and position of fields were affected, of the cutting off of water, and of inconvenience in crossing tracks. On the other hand, in McReynolds *v.* Burlington & O. R. Ry. Co.([b]) the Supreme Court of Illinois held that it was not proper to consider the danger of crossing with horses and wagons, nor the danger of members of the family being hurt, the court saying: "Such merely possible damages do not form a proper basis for the assessment of the amount of damages—it is only such damages as are reasonably probable." The general rule in condemnation proceedings is that the plaintiff recovers entire damages—that is, all the damages past, present, and prospective that are the natural, necessary or reasonable incident of the improvement, but not such as may arise from negligent or otherwise improper construction or use.([c]) It is, as a result of this fundamental distinction that runs through all the cases, that juries have been allowed to consider such elements of damage as the annoyance likely to be caused by smoke and noise;([d]) the liability for the loss of the use of a spring by having subterranean channels cut off;([e]) inconvenience to the owner from the constant

([a]) 88 Pa. 178.

([b]) 106 Ill. 152.

([c]) Denver City I. & W. Co. *v.* Middaugh, 12 Col. 434; Sabin *v.* Railway Co., 25 Vt. 363; Aldrich *v.* Railway Co., 21 N. H. 359; Sawyer *v.* Keene, 47 N. H. 173; Van Schoick *v.* Canal Co., 20 N. J. L. 249; Springfield & M. Ry. *v.* Rhea, 44 Ark. 258.

([d]) Matter of Utica, A. &. S. V. R.R. Co., 56 Barb. 456.

([e]) Aldrich *v.* Electric Railway Co., 21 N. H. 359.

use of the track;[a] increased liability to overflow of water resulting from the construction of a canal;[b] and damages arising from seepage or leakage from a canal[c] or from a canal and reservoir;[d] while, on the other hand, a common-law action has been sustained for the construction of an ordinary cartage road on plaintiff's adjoining land by the company,[e] on the ground that this would not be included in the award; and so the destruction of a land-owner's crops by reason of his fences being thrown down, and the cost and annoyance of keeping cattle out are an independent tort.[f] This distinction may often become of importance as raising a question of *res adjudicata*. The general rule is, that judgments are conclusive between the parties not only as to all matters actually determined, but as to every other matter which might have been litigated and disposed of upon the pleadings and evidence. Hence in Colorado it has been held that in assessing damages for lands taken for the construction of a canal and reservoir thereon, injuries to the residue of such lands from seepage and leakage should have been anticipated and provided for in the original assessment, and that no subsequent recovery can be had except on proof that the seepage and leakage complained of comes from negligence or unskilfulness.[g]

In City Council of Montgomery *v.* Townsend,[h] a case of injury through change of grade in a street, the falling of a brick wall, and the apprehended undermining of the

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[a] Chicago & I. R.R. Co. *v.* Hopkins, 90 Ill. 316.
[b] Canal Co. *v.* Grove, 11 Gill & J. 398.
[c] Van Schoick *v.* Canal Co., *ubi supra*.
[d] Denver City I. & W. Co. *v.* Middaugh, 12 Col. 434.
[e] Sabin *v.* Railroad Co., *ubi supra*.
[f] Springfield & M. Ry. Co. *v.* Henry, 44 Ark. 360.
[g] Denver City I. &. W. Co. *v.* Middaugh, 12 Col. 434 (Elliott, J., diss.).
[h] 80 Ala. 489.

house by rains, were excluded. The court put this on the ground of their being damages caused by the intervention of an independent agency and consequently too remote to be considered elements of damage. But as the case was under one of the new constitutions, and the measure of damages was held to be the difference between the market value of the lot before and after the lowering of the sidewalk, the meaning of the decision probably is that these items were not to be allowed for *in addition to* the depreciation of market value. For it is certainly of such elements as these that the total damage is made up.

§ 1165. **Elements of damage.**—As the elements which enter into and affect the sum total of damages are innumerable, it is difficult to set any limits to such an inquiry. In case of farm lands the expense of fencing is, as we have seen, always allowed.[a] In Texas the jury are allowed to consider the injury from smoke, cinders, noise, and other annoyances of like character.[b] So of risk from fire,[c] and even from cars running off the track, and from probable frightening of horses. In Pennsylvania, plaintiff, part of whose premises were taken, was obliged by a city ordinance to build five feet further back from the curb than it had been, the adjoining houses, however, remaining on the old line. In assessing damages for taking off

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[a] Curtin *v.* Nittany V. R. Co., 135 Pa. St. 20; Tonica & P. R.R. Co. *v.* Unsicker, 22 Ill. 221; Texas & St. L. Ry. *v.* Cella, 42 Ark. 528; Butte County *v.* Boydston, 64 Cal. 110 (condemnation for private road); Colusa County *v.* Hudson, 85 Cal. 633; St. Louis, J. & S. Ry. Co. *v.* Kirby, 104 Ill. 345 (temporary damage, the railroad not being obliged to fence for six months); Com'rs of Dickinson Co. *v.* Hogan, 39 Kas. 606; Raleigh & A. L. R.R. Co. *v.* Wicker, 74 N. C. 220; St. Louis, I. M. & S. Ry. Co. *v.* Walbrink, 47 Ark. 330; Minnesota V. R.R. Co. *v.* Doran, 17 Minn. 189.

[b] Galveston City & S. F. R.R. Co. *v.* Eddins, 60 Tex. 656.

[c] Galveston City & S. F. R.R. Co. *v.* Bock, 63 Tex. 245.

this five feet, it was held proper to consider the inconvenience of having the adjoining houses extending beyond plaintiff's, but also the possibility of the adjoining houses being set back at some future time. Some of the elements of damage, taken into consideration elsewhere, have been inconvenience and danger to family or stock in passing from one part of the property to another;[a] injury arising from the separation of grazing land from water, the water being on land of another, but the owner having the right to use it;[b] difficulty and danger of crossing the road.[c] So, also, for risk to abutting owners from obstruction of trains,[d] damages for division of the property,[e] for diminution of value caused by taking land containing a spring of water,[f] for obstruction to view, noise of trains, and interference with privacy,[g] and for rendering the remaining premises unhealthy.[h]

In determining damages to a farm the Supreme Court of Kansas says that it is proper to take into consideration every element of damage that can be reasonably anticipated, or might be reasonably anticipated, before the road is built, and what really does exist and is apparent after the road is constructed, including inconvenience of crossing, the raising of embankments, the digging of ditches, pools of stagnant water, and the obstruction to

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[a] Wilson *v.* Rockford, R. I. & St. L. R.R. Co., 59 Ill. 273.

[b] Com'rs of Smith Co. *v.* Labore, 37 Kas. 480.

[c] Stone *v.* Fairbury, P. & N. W. R. Co., 68 Ill. 394; Rockford, R. I. & St. L. R.R. Co. *v.* McKinley, 64 Ill. 338.

[d] Mix *v.* Lafayette, B. & M. R.R. Co., 67 Ill. 319.

[e] Galena & S. W. R. Co. *v.* Birkbeck, 70 Ill. 208; Peoria, A. & D. R.R. Co. *v.* Sawyer, 71 Ill. 361.

[f] Winklemans *v.* Des Moines N. W. Ry., 62 Ia. 11; Matter of Boston, H. T. & W. R.R. Co., 31 Hun 461.

[g] Ham *v.* Wisconsin, I. & N. Ry., 61 Ia. 716.

[h] Johnson *v.* Boston, 130 Mass. 452.

the surface water.[a] And so there are many cases holding that smoke, soot, fire sparks, noise, obstructions of view, annoyance to business, family occupations, etc., are all elements of damage.[b] And it is said generally that the amount given should include all inconvenience actually produced.[c]

On the other hand, it has been said that damages from the danger of killing stock and fire should not be considered;[d] that anticipated inconvenience from noise in the highway to worshippers in a church is not a ground of damages;[e] that nothing can be recovered from the inconvenience to which plaintiff's tenants are put;[f] that risk from probable frightening of stock is too speculative;[g] and so increased risk to an orchard on the premises by reason of leaving them more exposed to tramps and other persons, has been held to be too remote and speculative.[h] Counsel fees are no part of the damage.[k]

§ 1166. **Risk of fire.**—Risk of fire is generally allowed

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[a] Wichita & W. R.R. Co. *v.* Kuhn, 38 Kas. 104.

[b] Elizabethtown, L. & B. S. R.R. Co. *v.* Combs, 10 Bush 382; Grand Rapids & I. R. Co. *v.* Heisel, 38 Mich. 62; Ham *v.* Wis., Ia. & Neb. Ry. Co., 61 Ia. 716; Galveston City & S. F. Ry. Co. *v.* Eddins, 60 Tex. 656; Ry. Co. *v.* Gardner, 45 Oh. St. 309; Weyer *v.* Chicago, W. & N. R. Co., 68 Wis. 180.

[c] Jones *v.* Chicago & I. R. Co., 68 Ill. 380; Montmorency Gravel Road Co. *v.* Stockton, 43 Ind. 328. See, also, Selma R. & D. R.R. Co. *v.* Redwine, 51 Ga. 470; Same *v.* Keith, 53 Ga. 178; St. Louis & S. E. R. Co. *v.* Teters, 68 Ill. 144; Colvill *v.* St. Paul & C. Railway, 19 Minn. 283.

[d] Wilmington & R.R. Co. *v.* Stauffer, 60 Penna. St. 374; Alabama & F. R. Co. *v.* Burkett, 46 Ala. 569.

[e] First Parish in Woburn *v.* County of Middlesex, 7 Gray 106; *cf.* St. Louis, V. & T. H. R. Co. *v.* Haller, 82 Ill. 208.

[f] City of Dixon *v.* Baker, 65 Ill. 518.

[g] Leroy & W. Ry. Co. *v.* Hawk, 39 Kas. 638.

[h] Kansas City & E. R.R. Co. *v.* Kregelo, 32 Kas. 608.

[k] San José, etc., R.R. Co. *v.* Mayne, 83 Cal. 566.

for, but since if fire occur through negligence, the company will be liable to the owners, allowance should be made for this element.(a) The exclusion of proof of risk from negligence is on the general principle that the owner only recovers for lawful exercise of authority. Where risk from fire is allowed it has been held that the railroad cannot show that by the character of the appliances used by the company, fire could not reach the property, because the company was not bound to use these particular appliances. But as the court admitted that the railroad was bound to use the best appliances, the decision seems questionable. The true rule would seem to be to admit anything bearing on the risk within reasonable limits.(b) In Adden *v.* White Mts. N. H. R.R.(c) it was decided that a statute imposing upon railroad companies an absolute liability for any damages caused by their locomotives did not make it improper to take this element into consideration, the statute not being an absolute security against fire. If the risk is increased, so as to increase the cost of insurance, this would affect the market value. In North Carolina it is said that in condemnation proceedings there should be no allowance for exposure to fire, because compensation is given, not for

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(a) Texas & St. L. Ry. *v.* Cella, 42 Ark. 528; Adden *v.* White Mts. N. H, R.R., 55 N. H. 413; Kansas City & E. R. Co. *v.* Kregelo, 32 Kas. 608; Colvill *v.* St. Paul & C. Ry. Co., 19 Minn. 283; Lance *v.* C. & M. R.R. Co., 57 Ia. 636; Swinney *v.* Fort Wayne, M. & C. R.R. Co., 59 Ind. 205; Lafayette, M. & B. R.R. Co. *v.* Murdock, 68 Id. 137; Oregon & C. R.R. Co. *v.* Barlow, 3 Oreg. 311; Bangor & P. R.R. Co. *v.* McComb, 60 Me. 290; Pierce *v.* Worcester & N. R.R. Co., 105 Mass. 199; Peoria, A. & D. R.R. Co. *v.* Sawyer, 71 Ill. 361; 1 Redfield on Rys., 4th ed. 290, § 8; Pierce on R.Rds., 174, 175. *Contra*, Sunbury & E. R.R. Co. *v.* Hummel, 27 Pa. St. 99; Patten *v.* Northern Central R.R. Co., 33 Id. 426.

(b) Pingery *v.* Cherokee & Dak. Ry. Co., 78 Ia. 438.

(c) 55 N. H. 413.

risk, but for injury.(a) But if the risk affects the value, this would seem to be enough.

§ 1167. **Statutory requirement to fence.**—Railroads are frequently required by statute to fence their roads. In such cases, so far as the liability extends, the land-owner is relieved from the burden and hence should not recover compensation ; but the liability of the railroad to fence is not necessarily coterminous with the burden upon the land-owner. Thus in Pennsylvania, where a local act made it the duty of railroads to erect fences and in default thereof rendered them liable for injury to straying animals, it was still held proper for the jury to consider whether the construction of a railroad through a farm necessitated a change of internal or additional fencing to render it convenient for use.(b)

§ 1168. **Buildings.**—Buildings on the lands are, of course, part of the realty, and their value must enter into the award. Hence it is erroneous to instruct the jury that the damage to a house is what it is fairly worth to remove it to another place and put it in as good order as before. The owner has no right to remove buildings on land taken.(c) There seems no reason, however, why the rule that everything on the land goes with it should be regarded as an absolute one. In a case in Massachusetts, the court permitted the respondent to introduce evidence of the value of timber removed from the land and sold by the petitioner. As to this the Supreme Court said :

"All parties apparently proceeded on the ground that the right of the town to take land under the act for the purposes named did not necessarily include the right to take growing timber. The petitioner was permitted by the town, without

(a) Fore *v.* Western N. C. R.R. Co., 101 N. C. 526.
(b) Curtin *v.* Nittany V. R. Co., 135 Pa. St. 20.
(c) Finn *v.* Providence Gas & W. Co., 99 Pa. St. 631.

objection, to remove it after the taking. The authority given by the act was to take and appropriate so much only of the petitioner's estate as should be necessary and proper to carry out the purposes therein stated. The right to take is limited by the public exigency, in the same way as it is limited when land is taken for highways, railroads, and public sewers.[a] The power to take an absolute estate in fee simple is not conferred unless such an estate is necessary to the enjoyment of the defined privileges. There is nothing here to show that growing timber was necessary to the enjoyment of the respondent's rights or was intended to be included in the taking."[b]

§ 1169. **Injuries to business.**—In Illinois where a railroad was compelled by an ordinance to pay "all damages," it was held that an abuttor carrying on a mercantile business, could recover for injury to business caused by an excavation in front of his property. The court says that he could prove the decline in his business, but that this might be met by evidence of a general decline in business in that neighborhood. The damages for interruption of business would be limited, however, by the time necessarily employed in accommodating himself to another place of business, and the expenses of removal. During such time the measure of damages would be ascertained by proof of the probable and reasonable profits had there been no interruption.[c] And in such cases evidence of average monthly profits is admissible.[d] But he does not recover specifically for loss of profits as such.[e] Where a house is taken, the owner may recover not merely its market value, but additional damages for the inconvenience and loss resulting from his being deprived of his house and place of business.[f] It is not clear, however, from the

[a] Citing Clark *v.* Worcester, 125 Mass. 226.
[b] Gardner *v.* Brookline, 127 Mass. 359.
[c] St. Louis V. & T. H. R.R. Co. *v.* Capps, 67 Ill. 607.
[d] Atchison T. &. S. F. R.R. Co. *v.* Schneider, 127 Ill. 144.
[e] Chicago M. & St. P. Ry. Co. *v.* Hock, 118 Ill. 587.
[f] Covington S. R. T. Ry. Co. *v.* Piel, 87 Ky. 267.

report of this case, what the damage was. Apparently the court had in view the value of the particular use to the owner. As a general rule, apart from the language of particular statutes, the land-owner does not recover for injuries to business, but for the market value of the property taken, or for its depreciation.(a) Evidence of profits, value of business, etc., as we have seen in so many other cases, is often admissible as one means of proving value, and the confusion on the subject, where any exists, comes from overlookiug this distinction, or the fact that a particular statute may give a different measure of damages.(b)

§ 1170. **Conflict in the cases.**—It would be impossible to reconcile all the cases which have been decided on this subject. The difficulty comes chiefly from the same cause which has produced so much confusion in the whole subject, that the courts are not united in any single view, as to the *cause* for which the owner recovers compensation. Under the early rule, that he was only entitled to compensation caused by the *taking*, consequential damages were rigidly excluded, and the early cases show a disposition to exclude everything coming from the operation of the road, *e. g.*, inconvenience from noise and smoke, etc. Under the view now taken in so many cases, that any injury, or at least any physical injury, is a taking, consequential damages are admitted; because the cause for which compensation is given, is coextensive with the damage itself. Such, too, is of course the case under the new constitutions. This rule opens the door to wide speculation as to prospective damages, and at the same time compels the allowance of benefit

(a) Pittsburgh & L. E. R.R. Co. *v.* Robinson, 95 Pa. 426; Cobb *v.* Boston, 109 Mass. 438.

(b) Eddings *v.* Seabrook, 12 Rich. (S. C.) 504; Fuller *v.* Eddings, 11 Id. 239.

so far as it enters into and affects the damages. The only safe course under it is to admit all facts having a tendency to show present or prospective damage, but to permit the jury to consider only their bearing on *value.* In this way most hypothetical damages will be excluded. Such mere matters of conjecture, as that cars may hereafter at some uncertain time run off the track, are objectionable for two reasons. It seems unlikely that they can possibly affect present value, and it involves the supposition, which should always be excluded, of a negligent operation of the road. The court must also have a discretion to set reasonable limits to such an inquiry.

§ 1171. **Elements of value.**—If the elements of damage are very numerous, so also are the elements of value which enter into the estimate of land taken. As a general thing they include everything which can affect the value of a piece of property as between buyer and seller, for in condemnation proceedings so far as concerns the value of the property the title of which is absolutely transferred, the matter is everywhere regarded in the light of a purchase at a fair valuation.([a]) The general rule as to elements of value is, that the value of the land for all possible uses is to be considered. Thus, in estimating value of lots taken the commissioners are not confined to their value as lots, but may consider evidence of their value for any purpose;([b]) but this means only such uses as they affect the present market value.([c])

([a]) Esch *v.* Chicago, M. & St. P. R.R. Co., 72 Wis. 229.

([b]) *In re* N. Y. C. & H. R. R.R. Co., 6 Hun 149; Trustees of College Point *v.* Dennett, 5 N. Y. S. C. 217.

([c]) Schuylkill River, etc., R.R. Co. *v.* Stocker, 128 Pa. St. 233; Pennsylvania S. V. R. Co. *v.* Cleary, 125 Pa. St. 442; Amoskeag Mfg. Co. *v.* Worcester, 60 N. H. 522. The value of a house as such, and not merely the value of the materials, should be given. Lafayette B. & M. R.R. Co. *v.* Winslow, 66 Ill. 219.

As the damages are measured by the actual market value, the test of whether any particular element of value is to be taken into consideration, is dependent upon whether this use, or the expectation or possibility of it affects the market value, under all the circumstances of the case. Thus it has been held in Illinois,[a] in the case of lots available for dock purposes, but where there was no immediate demand, that their value when improved for this particular use, the profits derivable, or their value at some future time when the wants of the community might make the building of docks profitable, would be merely conjectural and remote; but if the location and possible future use for docks *enhanced their present market value in their existing condition*, this would form an element of damage to be considered by the jury. And so in the same State the same decision was reached as to lots available for the purpose of a saw-mill or factory.[b] And so, too, if the owner adopts a peculiar mode of using the land, as for a training track, which is a profitable use, he must be compensated for the loss of this.[c] And so of rights and easements appurtenant as an element.[d]

In a case in New York, the attempt was made to apply the rule, that value for all possible uses is to be considered, to a case where the land had been altered by the owner, so as to be of special value for railroad purposes. The commissioners stated in their report that they included the value of the land for railroad purposes. This was held to be error, the court saying: "The land would be worth, for railroad purposes, any sum, however

[a] Calumet River Ry. Co. *v.* Moore, 124 Ill. 329.

[b] Dupuis *v.* Chicago & N. Wis. Ry. Co., 115 Ill. 97.

[c] St. Louis, J. & S. R.R. Co. *v.* Kirby, 104 Ill. 345; King *v.* Minneapolis N. Ry. Co., 32 Minn. 224.

[d] Chicago, S. F. & C. Ry. Co. *v.* Ward, 128 Ill. 349.

large, which would not actually prevent the building of the road. Such a rule would do away with nearly all the benefit of the compulsory power of eminent domain. It would be giving more than compensation."([a])

§ 1172. **Possibility of procuring other land—Avoidable consequences.**—When the land has a value for a particular purpose, the possibility of obtaining other land in the neighborhood for the same purpose must enter into and affect the market value, and hence evidence bearing on this could hardly be excluded.([b]) But where a leasehold interest is affected, evidence that the lessor had offered the lessees another place at the same rate is inadmissible, both because the offer is not binding, and because the effect of the admission would be to compensate the land-owner in something else than money.([c]) The first reason would seem to be sufficient. The second reason assigned seems to confound the question of the extent and elements of the damage with a question of *the right of the commissioners* to compensate in anything save money. It is undoubtedly true that the commissioners as a general rule, under our constitutions, have no right to compensate in anything but money.([d]) But the question of how far the party injured is bound to avail himself of any means of reducing his loss actually within his reach is a question of the application of the rule of avoidable consequences. Would a binding

([a]) *Re* Boston, H. T. & W. Ry. Co., 22 Hun 176, 179. *Acc.* Matter of Black River & M. R.R. Co. *v.* Barnard, 9 Hun 104; but otherwise where the land was held for railroad purposes: Matter of New York, L. & W. Ry. Co., 27 Hun 116. See Goodin *v.* Cincinnati & W. C. Co., 18 Ohio St. 169. The case of Robb *v.* Maysville & Mt. Sterling T. R., 3 Metc. (Ky.) 117, which holds that the peculiar value of the land to the owner is to be taken as the measure of damages, seems opposed to the current of authority.

([b]) Matter of New York, W. S. & B. R. Co. *v.* Bell, 28 Hun 426.

([c]) Ib.

([d]) Lewis on Eminent Dom., §§ 460, 505, and cases cited.

offer to provide other premises in such a case as that above considered be held admissible? This is a question which the courts do not seem thus far to have considered.

§ 1173. **Bridges and ferries.**—When the property taken is of a peculiar character, the rule of market value may fail altogether. Thus where it consisted of a bridge, including a valuable right to take tolls, the Supreme Court of Pennsylvania said:

"The principle was invoked by the defendant that the true measure of damages was the market value at the time of the taking, and that to arrive at this value the jury cannot take into consideration the past annual net profits derived from a particular use of such property. The principle is well enough, but it has no application to the facts of this case. The property taken was of a peculiar character, and can hardly be said to have a market value. It was a bridge, and the corporate franchise of the company owning it. There are no sales of such property by which it can be compared, and a market value, in the fair sense of the term, ascertained. . . . . If the market value of this company's stock had been the test, the probability is that the defendants would have been more dissatisfied with the verdict than they are at present, and would have been invoking some other rule to relieve them therefrom. As to the particular use of this bridge, it is sufficient to say that the use referred to is the only one of which the bridge is capable, and if the damages cannot be measured by that use, they can be measured by no other. In this respect it differs from ordinary property taken under the right of eminent domain."[a]

In New Jersey, the charter of a bridge company provided that owners of ferries which should be injured by the erection of the bridge should be compensated. Under this clause, it was held that the moneys from tolls in preceding years was competent evidence.[b] In such

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[a] Montgomery Co. *v.* Schuylkill Bridge Co., 110 Pa. St. 54.

[b] Columbia Delaware Bridge Co. *v.* Geisse, 38 N. J. Law 39.

cases, the verdict is for the whole injury, and therefore includes prospective damages.(a)

Under the West Virginia constitution providing that compensation must be made for property *damaged*, an almost identical case has arisen. The proprietor of a ferry franchise had the exclusive right of transportation within half a mile of his ferry. When a bridge was erected within this limit, it was held that the damage to the ferry was measured by the revenues of the ferry; that if the landings were not in good order, but could be made so by the expenditure of money, the quantum of damages should be lessened to the extent of the cost of making them good, and *that the damages were not speculative, because the legislature might in the future take away the franchise or reduce the tolls.*(b) As to this the court says: "Unless we act upon the presumption that the franchise will continue to exist, we have positively no rule by which the damages could be measured at all." On the other hand, where the constitution does not provide for compensation for *damage*, the ordinary rule that compensation is not given for consequential injuries applies. Thus in Moses *v.* Sanford,(c) in condemning a strip of land along a river bank used as a ferry, it was held that plaintiff might recover the diminished value of the whole tract "as a wharf landing," but could not recover the diminished value of the franchise by reason of the opening of a bridge, to erect which the land was condemned.

§ 1174. **Value as affected by previous entry.**—It frequently happens, as we have seen, that the holder of a pub-

(a) S. C. 35 Id. 474. See Sullivan *v.* Board of Supervisors, 58 Miss. 790.

(b) Mason *v.* Harper's Ferry Bridge Co., 17 W. Va. 396; 20 Ib. 223; *acc.* Dougherty Co. *v.* Tift, 75 Ga. 815.

(c) 11 B. J. Lea 731.

lic franchise makes an entry upon land before instituting proceedings for condemnation. He may in so doing enter by consent of the owner, or his entry may be tortious. In many cases such an entry results in an enhancement of the value of the land either through fixtures which are annexed to it, or in some other way. At common law, in case of any wrongful entry, such improvement would inure to the benefit of the owner; and where this rule is strictly applied, the owner will in condemnation proceedings be entitled to compensation based on the enhanced value of his land given to it by the previous trespass. On this point, however, the decisions are far from being in harmony. In Massachusetts the Supreme Court has held that the railroad retains its property in the improvements affixed to the land only when the road is originally regularly located—*i. e.*, where there is a right of entry, or where the improvement was made with the owner's consent, or where he had acquiesced for several years. Hence where the company files no written location, and has no right of entry, or is a mere trespasser, the ordinary rule of the common law, that the trespasser can retain no title, applies. And such is the rule in many other jurisdictions.[a]

§ 1175. **Original entry unlawful.**—In Lyon *v.* Green Bay & Minn. Ry. Co.,[b] on the other hand, the Supreme

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[a] Meriam *v.* Brown, 128 Mass. 391. In this case the point decided was not between the railroad and the owner, but between the railroad and a mortgagee deriving title from the owner; U. S. *v.* Land in Monterey Co., 47 Cal. 515; Graham *v.* Connersville & N. C. J. R.R. Co., 36 Ind. 463; Matter of Long Island R.R. Co., 6 N. Y. Supreme Ct. 298; Matter of N. Y., West Shore & B. Ry. Co., 37 Hun 317; Hunt *v.* Missouri P. Ry Co., 76 Mo. 115; Kimball *v.* Adams, 52 Wis. 554.

[b] 42 Wis. 538; *acc.* Oregon R. & N. Co. *v.* Mosier, 14 Ore. 519; see Daniels *v.* C. I. & N. R.R. Co., 41 Ia. 52; Greve *v.* First Div. S. P. & P. R.R. Co., 26 Minn. 66.

Court of Wisconsin says that where the original entry is unlawful, but condemnation proceedings are subsequently instituted, the damages cannot include the improvements put upon the land; nor if the construction of the road has injured and reduced the value of the contiguous land of the owner, can such reduced value be the rule of appraisement. The basis must be the value at the time of the award, *had the railroad not been constructed.* In Morgan's Appeal,[a] in assessing damages for lands taken by a railroad, it was held error to include the value of a bridge put on the land by the railroad. The appellants contended that in putting the works on the land, the company acted without authority and as trespassers, and that the works therefore became part of the land. The original entry was under an attempted condemnation, which was held invalid.

In a case in Pennsylvania,[b] a condemnation proceeding where it appeared that the railroad company had laid its track on the land before proceedings were commenced, it was held that the value as enhanced could not be allowed for. The court said:

"This is not the case of a mere trespass by one having no authority to enter, but of one representing the State herself, clothed with the power of eminent domain, having a right to enter, and to place these materials on the land taken for a public use. . . . . It is true the entry was a trespass, by reason of the omission to do an act required for the security of the citizen, to wit: to make compensation or give security for it. . . . . The injury was to what the land-holder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him?" And further, "Another evident difference between a mere tort-feasor and a railroad company is this: the former necessarily attaches his structure to the freehold, for he has no less estate in himself, but the latter can take an easement

[a] 39 Mich. 675.

[b] Justice *v.* Nesquehoning V. Ry. Co., 87 Pa. St. 28, 31.

only, and the structures attached are subservient to the purpose of the easement."

And in several other States it is held that an improvement wrongfully placed on land by a railway company, and not abandoned to the owner, cannot be treated as part of the realty for the purpose of enhancing the damages in condemnation proceedings.(a) In California, where the general rule in case of tortious entry has been said to be that the land-owner is entitled to the enhanced value, it is held that if the original entry was in furtherance of pending proceedings for condemnation, although these were afterwards dismissed, upon the subsequent renewal of proceedings the land-owner is not entitled to be paid the value of the track, for the original *possession* was rightful.(b) The result of the cases in California seems to be that it is only in the case of an entirely wrongful and *mala fide* entry that the old rule prevails; that when the entry is made in good faith under circumstances showing an intention to condemn, the land-owner cannot profit by improvements placed on his land.(c)

Where the rule is, that the land-owner cannot enhance his damages by including in them the value of the improvements put on by the railroad, so neither can the latter diminish the damages by having the land valued as *damaged* by it. The value which is taken as the basis of the estimate is the value of the land unaffected by the improvement.(d)

(a) Toledo, A. A. & G. T. Ry. Co. *v.* Dunlap, 47 Mich. 456; Jones *v.* New Orleans & S. R.R. Co., 70 Ala. 227; Louisville, N. O. & T. R.R. Co. *v.* Dickson, 63 Miss. 380; Lewis on Em. Dom., § 507.

(b) California Pacific R.R. Co. *v.* Armstrong, 46 Cal. 85.

(c) Albion R. R.R. Co. *v.* Hesser, 84 Cal. 435; San Francisco & N. P. R.R. Co. *v.* Taylor, 86 Id. 246.

(d) North Hudson Co. R.R. Co. *v.* Booraem, 28 N. J. Eq 450; Lyon *v.* Green Bay & Minn. Ry. Co., 42 Wisc. 538; Morgan's Appeal, 39 Mich. 675.

§ 1176. **Value as enhanced, when allowed.**—When the improvements have been made by one railroad, and abandoned, and subsequently the question of value arises between the owner and another railroad company, he is entitled to compensation for the improvements. Thus, where the improvements consist of a grade, the owner will recover the market value of the land with the grade; if the grade can be used for railroad purposes, and if the land is more valuable for railroad purposes than for any other purpose, and the grade has enhanced the value for railroad purposes, then the enhanced value must be given.([a])

§ 1177. **Entry by consent.**—Where the entry has been made by the consent of the owner, express or implied, (and consent will be implied from occupation for several years),([b]) it is well settled that the owner cannot thereafter claim the value of what has been put upon his land.([c]) This is upon the ground that the entry was not originally that of a trespasser. In some cases, although there may be no consent actual or implied, the position taken by the owner or the circumstances may be such as to render it inequitable that he should be allowed the value of the improvements.([d])

§ 1178. **Value for special purpose.**—We have already seen that it has been decided in New York that the

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([a]) Cohen *v.* St. Louis, Ft. S. & W. R.R. Co., 34 Kans. 158.

([b]) Dietrich *v.* Murdock, 42 Mo. 279.

([c]) Cal. Southern R.R. Co. *v.* Southern Pac. R.R. Co., 67 Cal. 59; Emerson *v.* Western Union R.R. Co., 75 Ill. 176; Chicago & Alton R.R. Co. *v.* Goodwin, 111 Ill. 273; Indiana, B. & W. Ry. Co. *v.* Allen, 100 Ind. 409: in this case there was no express consent, but there was a long period of occupation. Cohen *v.* St. Louis, etc., R.R. Co., 34 Kas. 158; North Hudson R.R. Co. *v.* Booraem, 28 N. J. Eq. 450.

([d]) Sullivan *v.* Board of Supervisors, 58 Miss. 790; School District No. 2 *v.* Searle, 38 F. R. (Col.) 18.

value for railroad purposes cannot be considered. It is the value to the owner, not to the corporation condemning, that is to be taken into the account. But there are a good many cases where the property seems to have a special value to the owner as between him and any purchaser who should desire to get it for the *very purpose* of the improvement. The distinction which runs through the cases seems to be one of the methods of proof. It is not allowable to prove what the property is worth *to the corporation*, or *for the purposes of the corporation;* or what having it will *save the corporation;* but the special value, as between the owner and the world at large, can always be proved.

The leading case on this subject is Boom Co. *v.* Patterson,(a) in which three islands in the Mississippi were sought to be condemned for purposes of a boom or storing place for logs. The jury found that for general purposes the property was of small value, but that for the purpose in question it was of great value. It had never been used for such purposes, but there was nothing to prevent other persons or companies from engaging in the enterprise if they had desired to do so. It was held that the value for boom purposes was that which the owner was entitled to recover. So where the land is needed for a bridge it is generally held that its value for that purpose may be proved;(b) while in a similar case in Mississippi (c) it was held that proof that by reason of the conformation of the land and banks of the stream it would *cost a less amount* to build the bridge on his land than at any other point, was inadmissible. The court

(a) 98 U. S. 403; *acc.* Low *v.* Railroad, 63 N. H. 557.

(b) L. R. Junction Ry. *v.* Woodruff, 49 Ark. 381; Arcata *v.* Mad R. Ry. Co. *v.* Murphy, 71 Cal. 122.

(c) Sullivan *v.* Lafayette Co., 61 Miss. 271, 282.

said: "A man who owns a narrow pass between two mountains cannot estimate his damage when it is taken for a road by the cost of tunnelling one of the mountains or of surmounting the other." There is no question that all evidence of the cost of the improvement is entirely inadmissible; but supposing proof to be made in the form of evidence of value, as in the Arkansas and California cases, and Boom Co. *v.* Patterson,[a] the question is more difficult. Where it can be proved that the land would fetch more *in the market* as a bridge site, etc., it is certainly fair that the owner should get the benefit of this element of value; but when it would only fetch more *from the grantee of the franchise*, and this because it would cost him more to construct the work elsewhere, the mere fact that the evidence is put in the form of value should not make it admissible. It is safe to say that all such evidence should be scrutinized with great care. The difficulty seems to arise from witnesses being allowed to give their opinion as to the value of the property for a particular purpose. This they should not on principle be allowed to do. Where the land has a market value, as it almost always has, their testimony should be confined to this, and they should only be allowed to state their views of the value, taking *all the purposes* to which it is adapted into account. If it has no market value, the question in the last resort is *what is it worth*, still taking into account all these purposes.[b] The question may also arise, as in so many street cases, where, under the new constitutions, or under a particular construction of the old provision as to taking property, or under a special statute, the inquiry comes after the improvement is established, and is, what *would* be the mar-

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[a] 98 U. S. 403.

[b] Lewis on Eminent Domain, § 479.

ket value without the improvement. Here, unless the court permits an inquiry into all possible uses, it can have no data on which to base a judgment. The following extract from the opinion of the Supreme Court of Arkansas in one of the cases above cited will show the view generally taken of this subject. In L. R. Junction R.R. *v.* Woodruff,[a] at p. 390, the court said:

"Since, then, the market value is the criterion of damages, we are led to inquire what is the market value? The word market conveys the idea of selling, and the market value, it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay. The owner in parting with his property to the State is entitled to receive just such an amount as he could obtain if he were to go upon the market and offer the property for sale. To give him more than this would be to give him more than the market value, and to give him less would not be full compensation. Of course, real estate is not like cotton, grain, and other commercial products. It cannot be sold upon an hour's notice. To sell land at its market value sometimes requires effort and negotiation for some weeks or even for some months. And when we say that the owner is entitled to receive the price for which he could sell the property, we do not mean the price he would realize at a forced sale upon short notice, but the price that he could obtain after reasonable and ample time such as would ordinarily be taken by an owner to make sale of like property. Yet it must be the amount which could have been obtained for the property with reference to the market value at the time of its appropriation. One who anticipates an increase in the value of his property may feel it a hardship to surrender it without receiving more than its present market value, but it would be a hopeless task to either measure or satisfy the anticipations of a sanguine land-owner. If the market value is the price for which the property could be sold on the market, we are next led to inquire, how is the market value to be proven? This is usually done by calling witnesses who are

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[a] 49 Ark. 381, 390.

familiar with the property and asking their opinion as to such value. Here is one of the recognized exceptions to the general rule that witnesses are to state facts and not to express opinions. When the witness has made his estimate as to the market value of the property, it is competent to support his estimate by having him describe the property, giving its location, advantages, and surroundings, though ordinarily this would be uncalled for unless his estimate was attacked on his cross-examination ; in which case the party introducing him would have ample opportunity to rebut any facts which might appear to be derogatory to his estimate. How much latitude should be allowed the parties in the way of bringing out in the testimony collateral, or perhaps we should say cumulative facts, to support the estimates made by witnesses, is a matter that must be left very largely to the discretion of the presiding judge. We would not undertake to fix the limits of a discretion so necessary to be exercised. We deem it proper, however, to say that the presiding judge should not suffer collateral issues to spring up and multiply, or the jury to be taxed with facts and figures which could throw no appreciable light upon the question in hand, namely, the ascertainment of the market value of the property. As a general guide to the range which the testimony should be allowed to assume, we think it safe to say that the land-owner should be allowed to state and have his witnesses to state every fact concerning the property which he would naturally be disposed to adduce in order to place it in an advantageous light if he were attempting to negotiate a sale of it to a private individual. On the other hand, the jury and the opposing counsel, for the information of the jury, should be allowed to make every inquiry touching the property which one about to buy it would feel it to his interest to make. This is only another way of stating the rule laid down, as follows, in Boom Co. *v.* Patterson : 'In determining the value of land appropriated for public purposes the same considerations are to be regarded as in a sale of property between private parties.'"

The question has been considered in California, in a proceeding to condemn land for the purposes of a reservoir.(a) It was held that the problem was to ascertain

(a) San Diego L. & T. Co. *v.* Neale, 78 Cal. 63.

the market value of the land taken; that in this case there was no market in the sense of an actual demand or current rate of price; that therefore the value must be arrived at from the opinions of well-informed persons based on the purposes for which the property is suitable. This is not taking the "value in use" to the owner, but is merely a means of ascertaining what reasonable purchasers would in all probability be willing to pay for it; and "in such an inquiry it is manifest that the fact that the property has not previously been used for the purposes in question is irrelevant." (a) After reviewing the authorities it was decided that it was proper to consider the value of the property as a "reservoir site," and that it made no difference that there was no practicable site for a dam on the owner's property, the only use of which for reservoir purposes was in connection with the land of the plaintiff. If such a consideration were allowed any force, the court said, it would follow that "if the company owned but a small portion of the cañon, it would acquire all the rest, without regard to the value for the only purpose for which it had much value, merely because the other parties did not own the whole, and had not been able or did not choose to go into the business themselves." (b)

§ 1179. **Value enhanced by private road.**—In California, it has been held, when a private road is taken for a public highway, that the land-owner is entitled to compensation for the value of the road, it having been constructed and graded by him; and he cannot be limited to the value of the land as if it were unimproved; nor is the fact, that the defendant will have a public instead of a private way, of any importance.(c) The court said:

(a) Ib., p. 69. (b) Ib., p. 73. (c) Colusa Co. *v.* Hudson, 85 Cal. 633.

"The other principal question in the case relates to the claim of the defendant for compensation for his private road, the value of which as an improvement, he offered to show. The Superior Court excluded all evidence as to the value of this road, holding in effect that the land to be taken must be valued without any reference to the existence of the road, and just as if it were so much grazing land wholly unimproved. In this case we think the court erred. If a man had constructed a bridge across a stream on his own land, and for his private use, and if the county should lay out a highway to cross on that bridge, it would scarcely be contended that the county could condemn the bridge for the public use, without paying its reasonable value. We do not see that there is any distinction in principle between the bridge in the case supposed and the defendant's graded road in this case. The grade is there. It must have cost something, and is no doubt of some value. The county proposes to take it and use it as a part of the highway. If its existence will make the construction of the highway any less expensive, the county will get the benefit, and ought to pay the value. The fact that defendant will have a public way in place of his private road is no answer to this proposition. He will enjoy the highway in common with the general public, and must pay his share of the cost." (a)

(a) Ib., p. 638.

CHAPTER XXXIX.

THE MEASURE OF DAMAGES UNDER THE NEW YORK STATUTES OF EMINENT DOMAIN, AND FOR ILLEGAL OCCUPATION OF STREETS.

§ 1180. Introductory.
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1182. General principles established by early decisions.
1183. Use of street by horse railroads.
1184. By steam railroads.
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1200. Right of action not dependent on time when title acquired.
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1205. Loss of profits—Falling off of trade—Certainty.
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§ 1180. **Introductory.**—We have examined the peculiar rules governing the interpretation and measure of compensation under the English statutes; and have also considered the general rules prevailing throughout the United States, and also the question of the allowance of benefits generally. We shall now proceed to examine the development of the law of compensation in a single

American State—that of New York, where, under a constitution in no way changed, the principles of its construction have been so applied as to give relief in cases which originally would have been considered beyond its protection.

§ 1181. **Constitution and statutes.**—The constitution of the State of New York provides simply that private property shall not be *taken* for public use without just compensation.(a) In some instances statutes have given a larger measure of compensation, and cases arising under them do not throw any direct light on the constitutional clause. In New York benefits are admitted in the case of street openings; but in condemnation proceedings where private property is taken for railroad purposes, all benefits, "real or supposed," are excluded from consideration.

§ 1182. **General principles established by early decisions.**—Under this constitution the earlier cases established the general conclusions reached in most of the States, of which the most important was that redress was limited to actual taking of property, and that where no property was taken no recovery could be had for consequential damages so called. These early cases have not been overruled, and this general principle is still the law in New York.(b)

(a) Const. N. Y., Art. I., Sec. 6.

(b) Gould *v.* Hudson River R.R. Co., 6 N. Y. 522; Bellinger *v.* N. Y. Central R.R. Co., 23 N. Y. 42; Moyer *v.* N. Y. C. & H. R. R.R. Co., 88 N. Y. 351; Conhocton Stone Road Co. *v.* Buffalo, N. Y. & Erie R.R. Co., 3 Hun 523; Corey *v.* Buffalo, C. & N. Y. R.R. Co., 23 Barb. 482; Getty *v.* Hudson River R.R. Co., 21 Barb. 617; Ely *v.* City of Rochester, 26 Id. 133. The Revised Statutes (1 R. S. 515) provide in the case of opening highways, merely for the assessment of damages. Under this provision, where no land was taken, but a road opened along the boundary of the relator, subjecting him to increased expense for maintaining a fence, he was held not entitled to compensation. People *ex rel.* Newton *v.* Supervisors of Oneida Co., 19 Wend. 102.

In Hamilton *v.* N. Y. & Harlem R.R.Co.,(a) Walworth, Ch., denied an application on behalf of property owners on the street for an injunction to restrain the defendants from extending their railroad through Broome Street, on the ground that a railroad which is so constructed as to leave the street free for the passage of carts and vehicles of any kind, was not a nuisance. This was followed in Drake *v.* Hudson River R.R. Co.(b) In Chapman *v.* Albany & Schenectady R.R. Co.,(c) these cases were followed by a decision that a railroad company was not responsible to abutters for consequential damages caused by re-grading a street, if done in a proper manner. In this case the court below charged in favor of the plaintiffs, but expressly excluded from the consideration of the jury any damage for noise, etc., except through improper management.(d)

It is settled also that a mere change in the grade of a street, no matter how much injury it may cause, is not a taking of property. In Radcliff's Exrs. *v.* The Mayor of Brooklyn (e) it was held that no action lies for damage done to property by a municipal corporation by grading a street when lands are not actually taken. Bronson, C. J., said that the case seemed to fall within the principle that a man may *enjoy his land in the way such property is usually enjoyed without being answerable to an adjoining land-owner for indirect or consequential damages;* or within the authority of the cases holding that persons

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(a) 9 Paige Ch. 171.

(b) 7 Barb. 508.

(c) 10 Barb. 360.

(d) Hentz *v.* L. I. R.R. Co., 13 Barb. 646.

(e) 4 Comst. 195. This case questions the authority of Fletcher *v.* Auburn & S. R.R. Co., 25 Wend. 462; and, from Bellinger *v.* N. Y. Central R.R., 23 N. Y. 42, the latter seems to be overruled.

acting under public authority to improve streets, are not liable for consequential damages.(a) He said :

"The opening of a new thoroughfare may often result in advancing the interest of one man or a class of men, and even one town, at the expense of another. The construction of the Erie Canal destroyed the business of hundreds of tavern-keepers and common carriers between Albany and Buffalo, and greatly depreciated the value of their property, and yet they got no compensation. And new villages sprung up on the line of the canal at the expense of old ones on the former line of travel and transportation. Railroads destroy the business of stage proprietors and yet no one has ever thought a railroad charter unconstitutional, because it gave no damages to stage owners. The Hudson River railroad will soon drive many fine steamboats from the river ; but no one will think the charter void because it does not provide for the payment of damages to the boat owners. A fort, jail, workshop, fever hospital or lunatic asylum, erected by the government, may have the effect of reducing the value of a dwelling-house in the immediate neighborhood ; and yet no provision for compensating the owner of the house has ever been made in such a case. Many other illustrations might be mentioned, but it cannot be necessary to enlarge.

"The opening of a street in a city is not necessarily an injury to the adjoining land-owners. On the contrary, it is in almost every instance a benefit to them. The damage which they sometimes sustain, because the level of the street does not correspond with the level of their land, is usually more than compensated by the increased value which the property acquires by having a new front on a street. In some instances the land-owner will suffer a heavy loss ; and this case may, perhaps, be one of the number; but it is *damnum absque injuriâ*, and the owner must bear it. He often gets the benefit for nothing, when the value of his land is increased by opening or improving a street or highway ; and he must bear the burden in the less common case of a depreciation in value in consequence of the work." (b)

§ 1183. **Use of street by horse railroads.**—It is settled that the use of the streets, the fee of which is in the

(a) p. 203.

(b) Radcliff's Exrs. *v.* Mayor of Brooklyn, 4 Comst. 195, 206.

public, for horse railroads does not violate the constitution ;[a] but that an abutter who owns the fee to the centre, is entitled to compensation.[b] In People *v.* Kerr [c] the Court of Appeals held that the construction of a horse railroad upon the surface of streets is an appropriation to public use which the State has power to make, and does not violate the constitutional inhibition against taking private property for public use, and that the possibility of reverter in the abutter is not property which has any appreciable value in the eye of the law. In Kellinger *v.* Forty-second St. & G. S. F. R.R. Co.,[d] Church, C. J., said :

"There are expressions in some of the opinions apparently favoring the idea that such an action may be maintained. It was said in Drake *v.* Hudson River R.R. Co.[e] that for contingent and consequential injuries, the parties aggrieved are not entitled to compensation as for property taken for public use, but that an action will lie for such injuries. The force of this remark is spent in limiting it to the statement that such injuries are not a taking of property within the meaning of the Constitution, without intending to define what injuries might be recovered for by an action, and this view is confirmed by another portion of the same opinion, in which it is said that adjoining owners have no exclusive right in the streets, but that all other citizens, including railroad companies, have equal rights, subject to the control of the public authorities. If this is so, there is no principle which will sustain an action for incidental injuries growing out of a lawful regulation by the public. When it is determined that a horse railroad is a public use of the street, the question is settled, that incidental inconveniences must be submitted to. They become merged in the superior interest of the

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[a] People *v.* Kerr, 27 N. Y. 188 ; Kellinger *v.* Forty-second St. & G. S. F. R.R. Co., 50 N. Y. 206.

[b] Craig *v.* Rochester City & B. R. Co., 39 N. Y. 404 ; Fobes *v.* Rome, W. & O. R.R. Co., 121 N. Y. 505.

[c] 27 N. Y. 188.

[d] 50 N. Y. 206, 211.

[e] 7 Barb. 508.

public. The decision in Fletcher *v.* Auburn & S. R.R. Co.(a) is cited and relied upon by the plaintiff. There the defendants were authorized to build a railroad upon a line to be selected by themselves, and to cross public highways, by restoring them to their original usefulness. In crossing the highway near the plaintiff's premises, they raised an embankment, which obstructed free access and otherwise injured his property, and they were rightfully held liable for the damages. The power exercised in that case by the legislature was entirely unlike that exercised here.

"In the first place, the fee of the highway was assumed to be in the adjoining owner, and the court held that the legislature had not and could not, without compensation, authorize the injury complained of, and that all that the legislature professed to do was to protect the defendants from prosecution by the public for obstructing the highway, leaving the rights of the plaintiff untouched. The authority was in no sense a regulation of the use of the highway, but a privilege granted free, as against the public only. Similar views are applicable to the case in 2 Dutch. 148.(b) These and like cases are reconcilable with The People *v.* Kerr,(c) upon the difference between the extent of the rights and powers of the public authorities, possessed and exercised in the different cases, although the expressions of judges may seem to conflict. It is conceded that the authority to lay a railroad in the streets in the city of New York is lawful without compensation or liability to adjoining owners, and yet the laying of such road even in the widest streets may be and often is a disadvantage and injury to the property adjoining the street, rendering it less accessible and desirable and less valuable. If this action can be maintained, I see no reason why in all cases of inconvenience and injury a similar action might not lie. The principle would be the same, and the injury would be only a question of degree. Such a result would not only overthrow previous adjudications, but would unsettle rights of property to an incalculable amount, and inflict serious injury upon the public. But while we feel bound to hold that this action cannot be maintained upon the allegations contained in the complaint, we do not intend to de-

(a) 25 Wend. 462.
(b) Tinsman *v.* Belvidere Dela. R.R. Co., 2 Dutch. 148.
(c) 27 N. Y. 188.

termine that there are no circumstances which will justify an action. All the authorities concur that an injury to private rights or property, committed through negligence or willful misconduct, even though in the pursuit of a lawful purpose, may be redressed by an action."

§ 1184. **By steam railroads.**—The Court of Appeals has expressly decided, upon a full review of the authorities,(a) that there is no difference in principle between the case of a railroad in the streets of a city operated by steam and one operated by horse power, and that there is no liability for any consequential damages to adjoining property from a reasonable use of the street for railroad purposes, *not exclusive in its nature*, and substantially upon the same grade as the street itself, and leaving the passage across and through the streets free and unobstructed for the public use.(b) These decisions seem to be based on the view that where the fee remains in the abutter, any new burden in the way of a new user of the street is a "taking" for which compensation must be made; but where he has no fee, the railroad is merely a proprietary use of land, for the consequences of which to an adjoining property owner there is no responsibility. The court says, however, that prior to the decisions in the elevated railroad cases, if it appeared that the user of the street were *excessive or exclusive, so as to constitute a nuisance*, the owner had a right

(a) Corning *v.* Lowerre, 6 Johns. Ch. 439; Drake *v.* Hudson River Railroad Co., 7 Barb. 508; Williams *v.* New York Central R.R. Co., 16 N. Y. 97; Wager *v.* Troy Union R.R. Co., 25 Id. 526, People *v.* Kerr, 27 Id. 188; Craig *v.* Rochester City & B. R. Co., 39 Id. 404; Kellinger *v.* Forty-second Street & G. S. F. R.R. Co., 50 Id. 206; Mahady *v.* Bushwick R.R. Co., 91 Id. 148; Washington Cemetery *v.* Prospect Park & C. I. R.R. Co., 68 Id. 591; Story *v.* New York Elevated R.R. Co., 90 Id. 122; Lahr *v.* Metropolitan El. Ry. Co., 104 Id. 268; Drucker *v.* Manhattan Ry. Co., 106 Id. 157; Hussner *v.* Brooklyn City R.R. Co., 114 Id. 433.

(b) Fobes *v.* Rome, Watertown & O. R.R. Co., 121 N. Y. 505.

to redress. A railroad *per se* cannot constitute a nuisance, because, as was said by Church, C. J., in Kellinger *v.* Forty-second Street, etc., R.R. Co.,[a] a nuisance cannot grow out of a lawful act; and here a remark of Emott, J., in People *v.* Kerr,[b] may well be quoted: "I do not attach any importance to the motive power. I have no doubt that steam will ultimately be applied to carriages upon common roads, and I suppose it might be used upon these iron ways without affecting the present question."[c] The bearing of this consideration on the measure of damages of course is important. Wherever the operation of railroads in streets is regarded as a taking of property, the value of the easements must be appraised (in condemnation proceedings) once for all. If the character of the motive power is to affect the damages, either the possibility and probability of a change in the motive power ought also to be taken into the account; or else on the one hand the introduction of a new and more burdensome motive power will make the damages awarded too light, while on the other the substitution of a less burdensome one (as, for instance, electricity) will render them too small. The estimate of damages in all such cases cannot be more than an approximation.

§ 1185. **The measure of damages.**—Keeping in view the general principles already stated, we will next consider what the courts have said as to the measure of damages. In Troy & Boston R.R. Co. *v.* Lee,[d] Harris, J., said that in case of appraisal the rule was the difference in market value before and after the improvement. This was a case

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[a] 50 N. Y. 206.
[b] 27 N. Y. 188.
[c] Ib., p. 204.
[d] 13 Barb. 169.

of land taken. In Albany Northern R.R. Co. *v.* Lansing,[a] also a case of land taken, the same judge held that it made no difference whether the land was taken for a railroad or a garden, that the use to which it was to be put could not be considered, the *taking* only being the cause of damage. The question arose upon an appeal from the appraisal and report of commissioners, appointed pursuant to the fifteenth section of the general railroad act.[b] Rochester & Syracuse R.R. Co. *v.* Budlong [c] and Albany & Sus. R.R. Co. *v.* Dayton [d] merely hold that diminution of value is to be considered. Troy & Boston R.R. Co. *v.* Northern Turnpike Co.[e] was the case of a turnpike crossed by a railroad. The court held that evidence as to diminution of business by the construction of a railroad was inadmissible. This "does not constitute a legitimate element in the compensation, for which the railroad act provides. Every public improvement, from the necessity of the case, must affect some property favorably and some unfavorably. When this effect is merely consequential, the injury is *damnum absque injuriâ*." So in Canandaigua & Niagara Falls R.R. Co. *v.* Payne,[f] it was held that the consequential injury which a mill, situated on a portion of land not taken, may be likely to sustain from the construction and operation of a railroad on land taken, could not be considered. *In re* Union Village & Johnsonville R.R. Co.,[g] land was taken. Held, that the commissioners could not consider the danger to plain-

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[a] 16 Barb. 68.
[b] Laws of 1850, ch. 150, p. 211; 1 R. S., 4th ed., p. 1220.
[c] 6 How. Pr. 467.
[d] 10 Abb. Pr. N. S. 182.
[e] 16 Barb. 100.
[f] 16 Barb. 273.
[g] 53 Barb. 457.

tiff's property from fire from engines. The court (Ingalls, J.) said: "It is quite obvious that the legislature intended that the advantages which would be produced by the establishment of a railroad should compensate, to some extent, at least, for the disadvantages consequent thereupon; for it is expressly provided that such advantages shall not be taken into account to reduce the damages to which the owner of the land is entitled." The defendant had upon his land a flax-mill, which he claimed would be endangered by fire; but the court said that any inquiry into this would entail an inquiry into the question whether the business was likely to be permanent and profitable, which at best would only be conjectural, and not furnish a reliable basis for an appraisement of damages. *In re* Poughkeepsie & Eastern R.R. Co.(a) land was taken, comprising part of a railroad leading to a mine. Held, that damages would include all the injury from the taking of the property "for the purpose intended." The injury, however, before the court was direct injury to access, not injury from the character of the use to which the property taken was to be put. In People *v.* Eldredge,(b) gypsum, and the right to mine it, were taken. Held, that the difference in value was the measure.

In re Prospect Park & Coney I. R.R. Co.(c) was a case of condemnation proceedings. In this case the land was originally taken for a highway, and subsequently again appropriated for a railroad. The statute had granted a license for this purpose, but compensation had not been made, and the exercise of the license made the petitioner a trespasser. The court said, citing Radcliff's

(a) 63 Barb. 151.
(b) 3 Hun 541.
(c) 13 Hun 345; *cf. Re* Utica, C. & S. V. R.R. Co., 56 Barb. 456.

Exrs. *v.* Mayor of Brooklyn,(a) that the land-owner could not recover damages as for a continuing trespass; that when the railroad acquired the property, its use of it becomes lawful, and any indirect or consequential injury is *damnum absque injuriâ.*

"If the railroad has benefited the land-owner, such benefit cannot be taken into consideration, but in such case the value of the land actually taken must be awarded. But in determining such value, allowance must be made for the easements to which the land had been previously subjected. In some cases that would naturally reduce the compensation to be awarded to a nominal or nearly nominal sum. If the taking is an injury to the land-owner beyond the value of the land actually taken, such injury must be measured by the depreciation of his remaining property, which was caused solely by such taking; for it is only for the *taking of property* that the Constitution requires compensation to be made. The legislature may, unquestionably, require compensation to be made for indirect and consequential damages; but they have not done so in the present instance. We are, therefore, remitted to the provision of the Constitution which requires compensation to be made for the *taking* of private *property*, and not for the *use* to which the property may be legally subjected *after* it has been taken."(b)

On a motion for a reargument, however, the court laid down the rule to be the value of the land taken and the depreciation of that not taken, and any depreciation caused by the use to which the land taken is to be appropriated. In this statement Barnard and Dykman, JJ., concurred; Gilbert, J., dissented.

Black River & M. R.R. Co. *v.* Barnard (c) lays down the ordinary rule that where land is taken the difference between the fair marketable value of the whole and the fair marketable value of the property not taken, is the

(a) 4 Comst. 195.
(b) Matter of Prospect Park & C. I. R.R. Co., 13 Hun 345, 346.
(c) 9 Hun 104.

measure of damages. *In re* N. Y. Cent. & H. R. R.R. Co.(a) holds that the use to which property is to be put must be taken into account. In Matter of New York, West Shore & B. R. Co.(b) it was said that the measure of damages for taking a riparian easement of access would be the expense of restoring the easement to what it originally was.

Williams *v.* New York Central R.R. Co.(c) decides that the dedication of lands to the use of a highway does not preclude the *owner of the fee*, subject to the public easement, from maintaining an action against a railroad company, which, without his consent, or an appraisal of his damages, enters upon and occupies such highway with the track of its road. This case recognizes the authority of those cases which hold that *when the owner has parted with the fee a different rule prevails*, and goes so far as to say that "these cases and others of the same class may be considered as settling the question that a railroad in a populous town is not a nuisance *per se*." (d) This case also insists upon the distinction between inquiries into the violation of corporeal rights of property, and inquiries into the injuries which "unavoidably result from the construction of railways through the streets of populous towns and villages, such as noise, smoke, frightening of horses, obstruction to the free and convenient use of the street, etc." (e)

Henderson *v.* N. Y. Central R.R. Co.(f) was a second appeal of the Williams case. The prayer was for an in-

(a) 6 Hun 149.
(b) 29 Hun 646.
(c) 16 N. Y. 97.
(d) p. 103.
(e) p. 100; citing Drake *v.* Hudson River R.R. Co., 7 Barb. 508; Plant *v.* Long Island R.R. Co., 10 Barb. 26; Hentz *v.* same, 13 Barb. 646.
(f) 78 N. Y. 423.

junction, an abatement of the nuisance, and past damages, or a judgment that if defendants be permitted to continue in the use of the *locus*, it should be only on condition of paying the damages sustained. The complaint alleged ownership of the lands *to the centre of the street*, an unauthorized entry, cutting down to a lower grade, making embankments, and depreciation of the market value of the property. All the lots had been conveyed before trial, reserving all claims against defendants for damages. It was held—1st. That an allowance as an item of damages of the amount of the depreciation of *lots already sold* was proper, as also a provision in the judgment that on tender by plaintiffs of a conveyance of their interest, with a release from all claim for damages, except the item above stated, the defendant should pay a sum certain (the ascertained damages) with interest, or be enjoined from using the railroad. 2d. That the right to equitable relief rested on the fact that the trespass was continuous, and would tend to a multiplicity of suits; and therefore the plaintiff should recover all his damages. The court (Danforth, J.) say in this case that the depreciation in market value is the measure of damages. The Henderson case did not really turn upon a consideration of the question of the general rule of the measure of damages for taking property, which is not discussed in the opinion, but on the question of whether in equity the plaintiff could not recover damages for the whole wrong done him, instead of being confined to damages down to the commencement of the suit. The court distinctly held that in equity the ground of the jurisdiction being the avoidance of a multiplicity of suits, the plaintiff could not be confined to what he might recover in an ordinary single action of trespass.

In re Utica, C. & S. V. R.R. Co.(a) was a case where land was taken. This case is generally referred to as one establishing a rule that the damages flowing from other causes than the *taking* are to be considered; but there was a statute in the case, which the court seems to have thought enlarged the rule of damages. It was held that the owner might recover for any depreciation caused *by the use* to which the land taken was appropriated. The statute in this case required the commissioners to "ascertain and determine the compensation which ought justly to be made by the company to the owners or persons interested in the real estate appraised by them," and the court evidently thought it intended to cover more than mere taking, for they say, "whenever the language of such a statute is broad enough, as it clearly is in this case, to include *compensation for all the injury which would be caused by such taking and use*, it is to be construed that the legislature intended to afford such full and ample compensation."(b) This decision appears to have been based on a misconception, for the language of the statute did not differ materially from that of the elevated railroad statutes,(c) which certainly have never been supposed to enlarge the measure of damages.

§ 1186. **Conflict in the cases.**—These cases cannot be wholly reconciled. They really lay down two different rules of damages. *First*, the cases in which the *taking* only is regarded as the cause from which the damages flow give the plaintiff either the value of the land taken, increased by the damages to the remainder from the *taking* (excluding benefits real or supposed), or what is precisely the same thing, the difference in the value of

(a) 56 Barb. 456; *cf. Re* New York Central & H. R. R.R. Co., 15 Hun 63.
(b) 56 Barb. 466.
(c) L. 1875, c. 606, § 20.

the land as affected and as unaffected by the taking. This excludes the effects of the use. *Second*, the cases in which the taking *for the use* in question is regarded as the cause from which the damages flow give the plaintiff the difference in the value of the property as affected, not merely by the taking, but by the improvement as well. The objection to such a measure of damages is that it involves a consideration of those consequential injuries which the main rule expressly excludes. Of course, it may be fairly said that when property is taken under a statute, the purposes of the taking cannot be excluded from view; but, inasmuch as it has been decided, and is still law in New York, that consequential injuries, so-called, are *damnum absque injuriâ*, for which there can be no recovery, such a conclusion involves the assumption that where no property is taken consequential injury is excluded, but that the taking of anything which the courts hold to be property lets in the owner to recover the whole consequential injury, represented by the difference in value. But as we have already seen in the discussion of what we have called the third rule, and this the discussion of the elevated railroad cases will make still more clear, the tendency in many jurisdictions is to hold that physical damage to property *is* a taking, which completely reverses the original cause and effect, and makes the damage (often of the kind originally considered consequential) produce the *taking*. Such a complete change of view must produce a change in the rule of damages. The true measure of damages in this, as in any other case, is the amount required to place the owner in the same position as if the act from which the damage flows had not been authorized. So long as the *taking* was regarded as the act, consequential damages were excluded, for to introduce them would have required the

use of the property after it was taken to be looked into, while the theory of the early cases was that this could not be done. The new rule of damages introduced shows that the courts have abandoned the early rule. It is, of course, a mere form of words to say that there is a rule of law which excludes consequential damages, if there is a rule of damages which admits them.

§ 1187. **Elevated railway cases.**—The question of the right of a property-owner to recover damages under the New York constitution was supposed to be settled in accordance with the early view that there must be an absolute divestiture of title, and that for consequential injuries there is no liability, when the construction of the elevated railways in the city of New York brought up the whole subject again for a new consideration. These railroads were constructed through the heart of a populous city, and were operated upon a structure raised upon iron posts or piers, constituting a viaduct running through the streets, and necessarily in many cases making access more difficult for abutting owners, and depriving them frequently of light and air. The trains also added to the inconveniences of those owning property on the streets affected through noise, smoke, steam, cinders, etc. The charter of the elevated roads imposed no liability for damages, and the right to recover depended solely on the constitutional question. This was first presented to the Court of Appeals in the case of Story *v.* New York Elevated R.R. Co.(a)

In this case it appeared that defendant was about to erect such a structure as we have referred to for the purpose of operating an elevated road thereon, and plaintiff prayed for an injunction. In the courts below, the de-

(a) 90 N. Y. 122.

fendant obtained judgment in accordance with what was supposed to be the established law of the State. But on appeal the decision below was set aside and the relief prayed for granted. The plaintiff held under a deed from the city, which contained a covenant that it and other streets should "forever thereafter continue and be for the free and common passage of, and as public streets and ways for, the inhabitants of the said city, and all others passing through or by the same, in like manner as other streets of the same city now are, or lawfully ought to be." The majority of the court held that plaintiff, by force of this grant, had a right or privilege in the street which entitled him to have the same kept open and continued as a public street for the benefit of his abutting property; that this right constituted an easement in the bed of the street attached to the abutting property, and constituted private property within the meaning of the constitution, of which he could not be deprived without compensation; that the elevated structure [a] was inconsistent with the use of the street as a public street; that the plaintiff's property has been taken without compensation; that the defendant's acts are unlawful; and, the structure being permanent and the injury continuing, the plaintiff was entitled to an injunction; that the statutes under which the defendant railroad was organized authorized it to acquire property; and, finally, therefore, that the injunction should not be issued till the defendant had a reasonable time to acquire the plaintiff's property by agreement or condemnation proceedings.[b] Previous

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[a] In this case the attention of the court seems to have been wholly confined to the effect of the structure. The effect of operating the railroad does not appear to have been considered.

[b] Three judges, Miller, Earl, and Finch, dissented.

decisions of the court,(a) holding that ordinary surface horse-railways did not interfere with the ordinary use of a street, were considered not to affect the question. This case did not establish any rule of damages. As was explained in a later decision,(b) it established the principle that an abutting owner on the streets of the city of New York possesses, as incident to such ownership, easements of light, air, and access for the benefit of his abutting lands, and that the appurtenant easements and "outlying rights" constitute private property of which he could not be deprived without compensation. In a case decided soon after the Story case, however,(c) which turned upon the operation of a surface steam railroad in a street, the court fully considered the question of the measure of damages in all such cases, and the scope of the remedy in an ordinary legal action, and it was determined that such an action must be regarded as an ordinary case of trespass *q. c. f.*, or continuing nuisance; that the wrong was a continuing one, which might be redressed, and that consequently actions might be brought *de die in diem;* that in such an action the plaintiff could recover temporary damages only, that is, damages up to the commencement of the action, and not once for all, for the permanent depreciation of the value of the abutting lots. In Lahr *v.* Metropolitan El. Ry. Co.(d) the questions raised by the construction of the elevated railroads were again examined, and it was further held that the erection of an elevated railroad for permanent use in a street, upon which cars are propelled by steam engines, generating gas,

(a) People *v.* Kerr, 27 N. Y. 188; Kellinger *v.* Forty-second St., etc., R.R. Co., 50 N. Y. 206.

(b) Pond *v.* Metropolitan El. R.R. Co., 112 N. Y. 186.

(c) Uline *v.* New York Central & H. R. R.R. Co., 101 N. Y. 98.

(d) 104 N. Y. 268.

steam, and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easements, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages caused by such taking.

It was also decided in this case that it made no difference whether the abutter had acquired title as in the Story case, or derived title from an owner whose property in the street had been taken by the city under an act, providing that the land should be held *in trust* for the purposes of a street; or even whether any land was actually taken from the original owner, provided he was a party to the proceedings and assessed for a benefit. In any case the abutter was entitled to the advantages of the "contract created by the statute." The following extract will show the general scope of the reasoning of the court:

"An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property. These rights are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities, in raising the fund necessary to defray the cost of constructing the street. He is, therefore, compelled to pay for them at their full value, and if in the next instant they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property.

"Although it may be assumed that the municipality, by proceedings to open a street, acquires the fee to the land taken,

it is yet a qualified fee, held in trust under the statute for a certain use, and that use cannot be departed from without violating an essential condition of the contract under which the land was obtained.

"The right which the municipality acquires is limited by the public necessity, and in this case cannot extend beyond its use for street purposes, and all other uses which might be enjoyed therein, consistent with its use as a street, must from necessity have remained in, and resided with, the person from whom it was taken, even after the transfer of the fee to the municipality.(a) Even if this were not so, the covenant implied from the language of the statute, and the proceedings taken thereunder, was made with and intended for the benefit, among others, of abutting owners, and is a covenant which runs with the land and inures to the advantage of each successive grantee as he succeeds to the title.

"Covenants in conveyances, to the effect that adjoining lands shall be forever used in such manner as not to interfere with the free passage of light and air to the premises conveyed, are effectual to create an easement over the lands retained, for the benefit of the lands conveyed, and so it has been frequently held.(b) This easement constitutes property, of which its owner cannot lawfully be deprived without receiving compensation therefor, and it was so held in the Story case.

"The act of the legislature under which the defendant was organized, and from which its authority to take the property in question is claimed, if held to authorize an interference therewith, without making compensation, is plainly obnoxious to the objection that it sanctions the taking of private property for public use, and is also in conflict with that provision of the Federal Constitution prohibiting State legislatures from passing laws impairing the obligation of contracts. The logical effect of the decision in the Story case is to so construe the Constitution as to operate as a restriction upon the legislative power over the public streets opened under the act of 1813, and confine its exercise to such legislation as shall authorize their use for street

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(a) Citing Matter of Albany St., 11 Wend. 150; In the Matter of John and Cherry Sts., 19 Id. 659; Hooker *v.* Utica and Minden Turnpike Road Co., 12 Id. 371; Heyward *v.* Mayor, etc., of N. Y., 7 N. Y. 314.

(b) Citing White's Bk. of Buffalo *v.* Nichols, 64 N. Y. 65, 75, and cas. cit.

purposes alone. Whenever any other use is attempted to be authorized, it exceeds its constitutional authority. Statutes relating to public streets which attempt to authorize their use for additional street uses, are obviously within the power of the legislature to enact, but questions arising under such legislation are inapplicable to the questions here involved. Such are the cases in respect to the changes of grade; the use of a street for a surface horse-railroad; the laying of sewers, gas and water pipes beneath the soil; the erection of street lamps and hitching posts, and of poles for electric lights used for street lighting. All of these relate to street uses sanctioned as such by their obvious purpose, and long-continued usage, and authorized by the appropriation of land for a public street. We also deem it unnecessary to consider those cases defining the rights of municipal corporations in lands whereof they have obtained an absolute fee, by purchase or otherwise, for no such case is here presented, and they are in no sense analogous to the questions under consideration.[a] Neither do cases apply here which refer to the continued control retained by the legislature, over grants by the State of public privileges to individuals or corporations, for these are generally conferred subject to the power of revocation and modification by the legislature whenever the public interests require it, and their power over them is attributable to the reserved rights of the State in the subject of the grant.[b] It may also be proper to observe, without intending to discuss the case upon that theory, that it is difficult to see why this action is not maintainable within the principle recently decided by this court in Cogswell *v.* New York, New Haven & Hartford Railroad Company.[c] Certainly that case is a conclusive authority upon the question of what constitutes a taking of property within the meaning of the Constitution, and of the liability of the perpetrator of such injuries, for the damages occasioned by a corruption of the air, through the dissemination therein of noxious and unwholesome elements, such as gas, smoke, dust, cinders, ashes, etc., to the detriment of the property of adjoining owners." [d]

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[a] Citing Heyward *v.* Mayor, etc., of N. Y., 7 N. Y. 314; Rexford *v.* Knight, 11 N. Y. 308; De Varaigne *v.* Fox, 2 Bl. C. C. 95.

[b] Citing East Hartford *v.* Hartford Bridge Co., 10 How. (U. S.) 511, 536.

[c] 103 N. Y. 10.

[d] Lahr *v.* Metropolitan El. Ry. Co., 104 N. Y. 268, 291, *et seq.*

§ 1188. **Damages from operation of road.**—With regard to damages from the operation of the road, as distinguished from damages caused by the structure, the court said:

"But a single question of any importance remains to be discussed, and that refers to the claim made, that the defendant is not liable for the operation of its trains, and the consequences flowing therefrom, in respect to the manufacture and distribution in the air of gas, smoke, steam, dust, cinders, ashes, and other unwholesome and deleterious substances from its locomotives and trains, as they move to and fro over its tracks.

"We have been unable to see any reason why the defendant should not be liable for the injury thus occasioned, provided the evidence established the fact that they were destructive of the easements of light, air, and access belonging to the plaintiff.

"It follows necessarily from the proposition that a permanent structure erected in a street, interrupting to any considerable extent the passage of light and air to adjacent premises, works the destruction of easements for such purposes; that any incident of the structure which necessarily increases and aggravates the injury must be subject to the same rule of damage.

"No partial justification of the damages inflicted by an unlawful structure, and its unlawful use, can be predicated upon the circumstance, that under other conditions, and through a lawful exercise of authority, some of the consequences complained of, might have been produced without rendering their perpetrator liable for damages.

"The structure here, and its intended use, cannot be separated and dissected, and it must be regarded in its entirety in considering the effect which it produces upon the property of the abutter. However the damage may be inflicted, provided it be effected by an unlawful use of the street, it constitutes a trespass rendering the wrong-doer liable for the consequences of his acts.

"The legislature, as we have seen, had no power to authorize the street to be used for an elevated steam-railroad, and that want of authority extends to every incident necessary to make the road an operative elevated steam-railroad, which occasions injury to the rights of abutters on the street."(a)

(a) Lahr *v.* Metropolitan El. Ry. Co., 104 N. Y. 268, 294, citing Balt. & Pot. R.R. Co. *v.* Fifth Bap. Ch., 108 U. S. 317, 329.

§ 1189. **Alternative rule of damages.**—As we have seen, it had already been decided by the Court of Appeals that the injury in this class of cases would not be regarded as permanent. Nevertheless in this case the plaintiff was allowed to recover damages as for a permanent taking, on the ground that the defendant had "acquiesced" in this rule of damages, had admitted the permanency of the intended use, that the case was "tried upon this theory," that a request to charge was made by the defendant founded upon it which was adopted by the trial court, and that this constituted a waiver of any previous exception, if any there was, conflicting with the rule laid down; that finally the charge of the court was not excepted to, and that the "rule of damages having been thus agreed upon, the case was taken out of the operation of the Uline case." This ruling was followed in the case of Porter *v.* Metropolitan El. Ry. Co.,[a] in which the plaintiff recovered damages for permanent injury to the property. The result of these cases seems to be that while the general rule of damages is that the plaintiff can at law recover only such temporary damages as have been sustained up to the commencement of the action, still when he seeks to recover for the whole, the defendant may by acquiescence, and not taking the proper exception, allow him to do so. It is hardly necessary to say that this is an anomaly. We know of no other class of cases in which the plaintiff, being allowed one rule of redress for invasion of a property right by law, obtains a totally different one by the acquiescence of the defendant.[b]

This matter is of more than ordinary importance, for

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[a] 30 N. Y. St. R. 938 (Ct. of Ap. 1890).

[b] See Newman *v.* Metropolitan Elevated Railway Co., 118 N. Y. 618, another case of the same kind.

if there is any such general rule, the measure of damages may be changed in any case at the pleasure of the parties. And if a rule of damages, why not in any other branch of law? A rule of damages is nothing more than a measure of liability which the law prescribes when the facts of the case bring the parties within it; and it is hardly to be supposed that the plaintiff would be allowed to recover exemplary damages in contract, because the defendant acquiesced in it, or the value of the land where the rule was the consideration named in the deed, because the defendant did not object. If such were the law, we should have as many alternative rules of damages in any case as there now are rules of damages in the whole body of the law. The right to recover permanent damages in an action at common law under the New York decisions at the option of the parties might be rested on a totally different principle than that of waiver, or acquiescence in an erroneous rule of law by the defendant. It is held in many cases that where the nuisance is of a permanent character, or is treated so by the parties, then recovery may be had once for all in an action at law. The parties do not agree upon an erroneous rule of law. They simply agree upon a fact —that of permanence. The difficulty in applying this in New York is that in cases like the Lahr case the structure would have to be treated as permanent, while in an equity suit it would be treated as not permanent. This confusion, however, does not appear to be as dangerous as the confusion which would result from allowing the parties, by *waiver* or *acquiescence*, to agree upon a rule of damages different from that of the law which the court enforces. Nor should it be overlooked that the courts in New York see no inconsistency in assuming the structure to be temporary as a basis for an in-

junction, although in fact it is permanent. The subject seems to require further judicial explanation. The *ratio decidendi* of the Lahr case seems to be adopted by the Supreme Court of the United States in the recent case of the New York Elevated R.R. Co. *v.* Fifth Nat'l Bk.,(a) in which Mr. Justice Gray, speaking of the recovery of entire damages, cites a Massachusetts case (b) in support of the doctrine that a court is "relieved from the necessity of laying down a general rule on the subject" (of damages), "because in this case it clearly appears that the defendant procured or acquiesced in the rulings under which the trial was conducted, and thereby waived the right to object to them." But the Massachusetts case is only authority for the proposition that parties may waive their right to object to a particular species of evidence; but this is very different from acquiescing in an erroneous rule of damages; for this affects the substantive right and measure of liability. We have seen how reluctant courts have always been to allow parties even to stipulate a particular amount of damages for breach of a contract. It would certainly be a little strange if the same courts should see no objection to having rules for measuring damages imposed upon them by the acquiescence of the parties.

§ 1190. **General rule finally adopted.**—In Pond *v.* Metropolitan El. Ry. Co.(c) the question as to the rule of damages against the elevated railroads was finally disposed of. The only question on the appeal was whether in a common-law action brought by an owner of premises in the city of New York under a statute such as that referred to above, to recover damages resulting from the

(a) 135 U. S. 432.
(b) Shaw *v.* Stone, 1 Cush. 228, 243.
(c) 112 N. Y. 186.

interruption of light, the plaintiff could recover complete damages once for all, as for a final and complete destruction *pro tanto* of the easement invaded, or was confined to damages accruing up to the commencement of the action, as in an ordinary action of trespass upon land, leaving him to bring a new action in case the trespass is not discontinued. The court said :

" The Story case (a) established the principle that an abutting owner on streets in the city of New York, possesses, as incident to such ownership, easements of light, air, and access in and from the adjacent streets, for the benefit of his abutting lands, and that the appurtenant easements and outlying rights constitute private property of which he cannot be deprived without compensation. That was an equity action and the court having reached the conclusion that the defendant's structure was an unlawful invasion of the plaintiff's easements, granted an injunction, postponing its actual issuance, however, until after such reasonable time as would enable the defendant to acquire the plaintiff's right by voluntary agreement or compulsory proceedings. The Story case did not determine any rule of damages. But in Uline *v.* N. Y. C. & H. R. R.R. Co.(b) the general question as to the scope of the remedy in an ordinary legal action for damages sustained by an abutting owner from the construction of a railway in the street fronting his premises, without his consent and in violation of his rights, was elaborately considered, and it was determined that in such an action the plaintiff could recover temporary damages only ; that is, such damages as had been sustained up to the commencement of the action, and the judgment below which allowed damages measured by the permanent depreciation in the value of the plaintiff's lots upon the assumption that the trespass and wrong would be continued, was reversed. The case of Lahr *v.* Met. El. R. Co.(c) was an action like the present one, brought by an abutting owner for damages in which the plaintiff recovered the permanent depreciation in value of his premises by reason of the construction and operation of the defendant's road, on the theory

(a) Story *v.* N. Y. El. R.R. Co., 90 N. Y. 122.
(b) 101 Id. 98.
(c) 104 Id. 268.

that the appropriation and invasion of the plaintiff's easement was final and complete. This court affirmed the judgment, stating in its opinion that the case was taken out of the operation of the Uline case (*supra*), for the reason that the record disclosed that the parties had agreed upon the rule of damages. The plain inference is, that except for this, the doctrine of the Uline case would have controlled and the objection to the measure of damages would have prevailed. The case of New York National Exch. Bank *v.* Metropolitan Elevated Railway Company (a) is a still more explicit recognition by this court of the application of the doctrine of the Uline case to actions like this. That was an equitable action, brought by an abutting owner, and was sustained. The plaintiff was awarded judgment for past loss of rentals, and an injunction was granted restraining the further operation and maintenance of the road, unless the defendants paid a certain sum equal to the amount of depreciation in the value of the property, as for a permanent appropriation. There was no ground for maintaining the action for equitable relief upon any circumstances disclosed in the complaint, provided the plaintiff could have recovered permanent and complete damages, as for an actual taking of his easement, in a legal action. We think these cases have settled the rule that permanent depreciation cannot be recovered in an action like this. It is understood that this has been the interpretation of our decisions upon which the courts below have acted in many cases. It might be productive of less inconvenience, on the whole, if an opposite rule could be adopted. But the rule established is consistent with legal principles. A recovery of judgment for damages for a trespass or the invasion of an easement does not operate to transfer the title of the property to the defendant, either before or after satisfaction, nor does it extinguish the easement. By the ordinary rule it is an indemnity for a past wrong, leaving unaffected the plaintiff's right to his property. When he comes to the court for equitable relief, the court may mould it to suit the circumstances, as was done in Henderson *v.* N. Y. C. R.R. Co.(b) The present case was an action for damages simply. The plaintiff neither in his complaint nor on the trial asked for equitable relief." (c)

(a) 108 N. Y. 660. (b) 78 N. Y. 423.

(c) Pond *v.* Metropolitan El. Ry. Co., 112 N. Y. 186, 188.

§ 1191. **Right to recover for noise, etc.**—From what has already been said it is clear that the limits of the recovery are not yet well defined by these cases. If the measure of damages is the depreciation of the property *by the railroad*, other elements enter into it than the mere taking of the easements of light, air, and access by the structure, or even by the structure and its incidents. The noise made by passing trains does not affect these easements, nor is the effect upon the privacy of houses by the passage of a constant stream of cars directly opposite to and within a few feet of the windows connected with them. Yet how can we exclude the effect of such causes as these from the depreciation? In Drucker *v.* Manhattan Ry. Co.(a) it was held that it was proper for the jury to take into consideration as entering into the damages the effect of smoke, gases, ashes, and cinders, as impairing the easement of air; of the structure itself and the passage of the cars as affecting the easement of light; the drippings of oil and water and possibly the frequent columns as affecting the easement of access. The question as to the effect of the noise and vibration of buildings was not presented, there being no exception in the record to raise them, and it was intimated that there might be a difference of opinion among the judges on these points, probably because they could not be brought under the head of infringements of the easement of light, air, or access, and could hardly be held to impair the use of the street as such. But in Ode *v.* Manhattan El. R.R. Co.(b) noise was allowed for on the ground that it is "the aggregation of the discomforts suffered by the abutting owner for which compensation may be granted." It may be that noise, privacy, etc., should only be con-

(a) 106 N. Y. 157.

(b) 31 St. Rep. 106 (S. C. G. T., 1890).

sidered in actions for past damages; and in estimating damages to the fee should be disregarded, on the ground that in the former case the defendants are mere wrong-doers; in the latter they are purchasers of the three easements, as in condemnation proceedings. In this view, in the latter case the injury to the easements would correspond to the value of land *taken* in the ordinary case, while the remaining injury would be the *damnum absque injuriâ*. This is somewhat difficult of application, as the value of the different elements of damage cannot be discriminated in practice with any accuracy. What, for instance, is the depreciation caused by noise? How much, more or less, is it according as we include or exclude noise? ([a]) But the difficulty of making an accurate estimate is no argument against a correct rule.

§ 1192. **Exemplary damages not allowed.**—In a subsequent action for damages, ([b]) the court below charged that "the failure of defendant to institute condemnation proceedings before taking possession of plaintiff's property, and before the trial of this action, entitled the jury to give exemplary damages against them should the jury so desire." The action was commenced in 1884. But it was held that, in view of the history of the litigation on the question of the right to maintain such actions, it was impossible to ascribe a wrong motive to the entry of defendant or its predecessor upon the street in question, and that the failure to institute condemnation proceedings within the two years following the decision of the Story case was not of itself such a wanton, malicious, or oppressive act as would justify an award of exemplary

([a]) In Kane *v.* Metropolitan El. Ry. Co., 26 N. E. R. 278, the Court of Appeals has, since the above was written, allowed damages for noise, in an action at law for *past* damages.

([b]) Powers *v.* Manhattan Ry. Co., 120 N. Y. 178.

damages, and that the charge was, therefore, erroneous. Brown, J., said on this point:

"The purpose of awarding such damages is to punish a wrong-doer, and unless a wrong motive exists there is no basis for such award.

"The elevated road through Division Street, in front of plaintiff's property, was constructed in 1879, and trains commenced to run March 1, 1880. It was leased to the defendant by the Metropolitan Railway Co. May 1, 1879. The road was constructed under legislative authority, and the statutes authorizing the creation of elevated railway companies were declared constitutional.(a)

"Whether or not an owner of property abutting on the streets in which the elevated roads were constructed was entitled to damages caused by the construction and operation of the road was a question upon which there was a wide difference of opinion among lawyers and judges, and was not settled until the decision of this court in the case of Story *v.* N. Y. El. R.R. Co., in October, 1882.(b)

"It had been decided adversely to the property-owners by the lower courts, and the Story case was twice argued in this court, and from the decision finally made three members of the court dissented.

"The facts of the Story case were not broad enough to necessarily cover the case of an abutting owner whose only property in the street was an easement for light, air, and access, and hence the right of such owners to maintain actions for damages was not finally set at rest until the decision in Lahr *v.* Metropolitan El. Ry. Co. in January, 1887.(c) This action was commenced in August, 1884.

"In view of these facts, thus briefly referred to, and which now form one of the most important and interesting chapters in the history of litigation in this State, it is impossible to find a wrong motive in the entry of the defendant or its predecessor, the Metropolitan Railway Company, upon the street in front of plaintiff's property. It had legislative and judicial authority to support its acts. And assuming that plaintiff owned the fee in the bed of the street in front of his property, we do not think

(a) *In re* Gilbert El. Ry. Co., 70 N. Y. 361; *In re* N. Y. El. R.R. Co., Id. 327.

(b) 90 N. Y. 122.

(c) 104 N. Y. 268; 4 N. Y. State Rep. 340.

that a failure to institute condemnation proceedings within the two years following the decision of the Story case, along the whole line of its railway through the city, could be held to be of itself such a wanton and oppressive act as to justify an award of punitive damages." (a)

§ 1193. **Scope of the decisions finally announced.**—In Fobes *v.* Rome, Watertown & Ogdensburgh R.R. Co.(b) the decisions were once more reviewed by the Court of Appeals. The action was brought to recover damages for the operation of an ordinary steam railroad in a city street, the abutter having no estate in the soil. It was held that there could be no recovery. Peckham, J., said in the course of his opinion that the claim put forward that the Story case and the cases following it so far altered the law as to permit a recovery in all cases where the easement of the adjoining lot-owner is injuriously affected by any deprivation or diminution of light, air, or access, or that in all such cases there was a "taking" of property, was unfounded; that the Story case merely embodied the application of well-established principles of law to a new combination of facts, such facts amounting "to an absolute and permanent obstruction in a portion of the public street, and in a total and exclusive use of such portion by the defendant"; that such facts amounted to a taking of property. This obstruction, the court goes on to say, was due to the *structure*. "But this taking, it cannot be too frequently or strongly asserted, resulted from the absolute, exclusive, and permanent character of the appropriation of the street by the structure of the defendant. There is no hint in either of the prevailing opinions in the Story case of any intention to interfere with or overrule the prior adjudications in this State upon the subject now under discussion, as to the steam surface railroads." After showing

(a) Powers *v.* Manhattan Ry. Co., 120 N. Y. 178, 182.
(b) 121 N. Y. 505.

conclusively that the decision in the Story case is based wholly upon the effect of the *structure*, the court refers to the Lahr case, and says that "it is difficult to see that any enlarged rule as to awarding damages in that class of cases has been definitely announced. . . . . The particular damage which the defendant was liable for, growing out of the existence of the defendant's structure, was held by three of the five members of the court then voting to embrace such an injury or inconvenience as was incidental to the use thereof." The Drucker case, the court says, decided that it was a fair result from holding the structure an illegal one that the plaintiff should recover for the impairment of his easement of light *caused by the road itself, and passage of trains, and the interference with the convenience of access caused by drippings of oil and water*. The court distinguished Hussner *v.* Brooklyn City R.R. Co.,[a] because in that case the use of steam on the road was illegal. This case seems to confine the damages to the structure, and whatever is fairly *incidental* to it, including the running of trains. Noise is not spoken of, but would seem by the principles laid down to be excluded.

§ 1194. **Ownership in the street.**—In Stewart *v.* Metropolitan El. R.R. Co.[b] it was held by the general term of the Superior Court that the abutter on a public street was presumed, in absence of evidence to the contrary, to own to the middle of the street, and that the erection of defendant's structure was an encroachment upon the freehold and a trespass, and that a motion to direct a verdict for nominal damages only was improper. Other cases in the courts below treated the fact that plaintiffs did not own to the middle of the street as immaterial.[c] And

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[a] 114 N. Y. 433.

[b] 56 Super. Ct. 377.

[c] Thompson *v.* Manhattan R. Co., 29 St. R. 720 (C. P. G. T. 1890);

such would seem to be the true view on principle. The difference between the rights of an abutter on a street who has had the right of way for all the purposes of a street taken away, and one who has been deprived of the fee for the same purposes, must be at best shadowy. In either case his rights in the streets as such must be exactly the same; he must be treated either as having an easement of light, air, and access which is interfered with, or as not having it, and the only effect of the difference would be that in one case he could maintain (if held to have a right of action) trespass, in the other case. The true question underlying the cases is, has the use of the street as such been perverted? The question was finally disposed of by the Court of Appeals in Abendroth *v.* Manhattan Ry. Co.(a) It was expressly decided that the abutting owner can recover whether he owns to the centre or side of the street, and that it is not necessary that he or those from whom he derives title should ever have had any title to or estate in the land whereon the street is maintained, or any in the street except that of an abutting owner. The court says: "If the plaintiff by virtue of being an abutting owner has not sufficient private rights or interests in this street to have enabled him to have maintained an action for the injuries found to have been inflicted, *or for similar injuries inflicted without legislative authority*, then he is without remedy in this case." The court then cites a number of cases in which the plaintiffs were not all abutting owners, but in which none of them owned the part of the street in which

Stevens *v.* New York El. R.R. Co., 57 Super. Ct. 416; Abendroth *v.* N. Y. Elevated R.R. Co., 54 Super. Ct. 420; Minton *v.* N. Y. E. R. Co., 29 St. R. 527 (Super. Ct. G. T. 1890); s. c. 57 Super. Ct. 601; Hochhalter *v.* Manhattan R. Co., 31 N. Y. St. R. 112 (S. C. G. T. 1890); s. c. 56 Hun 642; Sobel *v.* N. Y. El. R. Co., 31 N. Y. St. R. 114 (S. C. G. T. 1890); s. c. 56 Hun 642.

(a) 122 N. Y. 1.

the obstruction or encroachment was placed.(a) Of these the court said:

"There are important differences between the case at bar and those cited. In the cases referred to, the acts which were held to be actionable wholly or partly obstructed the streets and rendered the property of the plaintiffs less accessible, and none of them were done pursuant to legislative authority; while in the case at bar the acts complained of were done pursuant to such authority, and do not, as found by the court, impair, in any substantial degree, the accessibility of the plaintiff's premises. But these cases do establish the principle that the owner of a lot on a public street, whether it extends across to the centre, or only to the side of the street, has incorporeal private rights therein which are incident to his property which may be so impaired as to entitle him to damages. If this be not so, it is difficult to see how he can maintain any action except such as can be maintained by a stranger for an immediate injury to person or property caused by an obstruction while lawfully travelling in the street."(b)

And the court proceeded to show that there was nothing inconsistent with this view in the elevated railroad cases already decided. As to the nature of the action the court said:

"The judgments for damages which have been recovered and sustained against the elevated roads do not, and cannot, rest on the ground that the roads are public nuisances, for they were constructed pursuant to statutes; and besides, as before stated, a public nuisance does not create a private cause of action, unless a private right exists, and is specially injured by it. The only remaining ground upon which they can, and do stand, is that by the common law the plaintiffs had private rights in the

(a) Corning *v.* Lowerre, 6 Johns. Ch. 439; Van Brunt *v.* Ahearn, 13 Hun 388; Crooke *v.* Anderson, 23 Hun 266; Fanning *v.* Osborne, 34 Hun 121; 102 N. Y. 441; Hussner *v.* Brooklyn City R.R. Co., 114 N. Y. 433; Callanan *v.* Gilman, 107 N. Y. 360; Stetson *v.* Faxon, 19 Pick. 147; Maynell *v.* Saltmarsh, 1 Keb. 847; Fritz *v.* Hobson, 14 Ch. Div. 542; Pierce *v.* Dart, 7 Cow. 609; Hood *v.* Smith, 5 N. Y. Week. Dig. 117.

(b) 122 N. Y. 14.

streets before the roads were built, or authorized to be built. It is clear, we think, that these rights were not created by the statutes under which the corporations were organized, nor by the construction of the roads ; nor do they exist by force of the judgment in Story's case, but they existed anterior to the construction of the roads, and have simply been defined and protected by the decisions made in the litigations against these corporations.

"It being established that an abutting owner has property rights in the streets, and that an action could have been maintained against the defendants for the recovery of the damages caused by their acts, had they been done without legislative authority, it becomes material to inquire whether such right of action is cut off because the road was constructed pursuant to such authority.

"The Constitution of this State provides, 'Nor shall private property be taken for public use without just compensation.'[a]

"It is settled by Story's case and Lahr's case that such rights as the plaintiff has in Pearl Street 'are private property,' within the meaning of the constitutional provision quoted ; and these cases also hold that, by the construction and operation of an elevated road in the street, in front of an owner's premises, his rights are 'taken for public use,' within the meaning of the Constitution. It follows that the authority conferred by the legislature to construct the road is not a defense to the action.

"Fobes *v.* Rome, Watertown & Ogdensburg R.R. Co.[b] does not decide that an abutting owner has not vested rights to light, air and access in a public street, which are incident to his lot, and which are private property, within the meaning of the Constitution ; but that the operation, pursuant to legislative authority, by the defendant, of its steam railroad on the grade of the street, which was at about the natural surface of the ground, was not an actionable invasion of the abutter's right. The learned judge who wrote the opinion in that case thus defined the limits of the question to be discussed: 'It (defendant) admits that plaintiff had an easement in that street, but it denies that it has occupied or appropriated it. Whether it has taken any portion of the plaintiff's easement in the street in question, is what the defendant asks shall be decided by us, and it denies

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[a] Const., Article 1, § 6.

[b] 121 N. Y. 505.

in toto any taking whatever of the plaintiff's property or any portion thereof.'

"The conclusion which we arrive at is, that the erection and operation of the elevated road in Pearl Street, immediately in front of the plaintiff's premises, in the manner and with the effect described in the findings of fact, was a material impairment of the plaintiff's right of property, for which he is entitled to recover compensation for the damages inflicted."([a])

In this case the question was made whether the plaintiff had lost his rights by acquiescence. On this point the court said:

"It is urged that if the plaintiff ever had a right of action, it has been lost by his acquiescence in the construction and use of the road by the defendant. It is found that when the road was being built through this street, the plaintiff forbade the New York Elevated Railroad Company to construct it, and threatened that corporation with litigation, but began no action until this suit was commenced, and in the meantime he has occasionally been a fare-paying passenger on the road. Had this action been brought in equity solely for the purpose of compelling the defendants to remove their structure, and if all persons having such interests in the elevated road as would entitle them to be heard before such relief could be granted, were parties to the action, personally, or representatively, this question might require some consideration; but in an action for the recovery of damages, the conduct of the plaintiff, as found by the court, and his delay in bringing the action, is not a defense."([b])

§ 1195. **Recovery at law limited to past damages.**—In Tallman *v.* The Metropolitan El. R.R. Co.,([c]) the plaintiff was the owner of four adjoining lots. He became the owner of three of them in 1866, and of the other in 1868, and he continued to own them until after the commencement of the action in February, 1884. The ele-

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([a]) 122 N. Y. 16.

([b]) Abendroth *v.* Manhattan Ry. Co., 122 N. Y. 1, 17.

([c]) 121 N. Y. 119.

vated railway was constructed through the street in front of these lots in 1878. The plaintiff used a part of his lots for a carpenter-shop and the remainder as a lumber-yard. The only question in the case before the Court of Appeals related to the rule of damages. After referring to the remedy in equity already discussed, by which the plaintiff might have had his entire damages assessed, the court says:

"He was not, however, confined to his remedy by such an action. He could suffer the railway to be constructed, and then bring successive actions to recover damages to his lots, caused by the construction, maintenance, and operation of the railway. In such an action he would recover his damages to the commencement of the action, and the action would be governed by the principles laid down in Uline *v.* N. Y. Central & H. R. R.R. Co.(a) In such an action the plaintiff cannot recover for the permanent diminution in the value of his lots. He can only recover the damages he sustains from day to day, or from month to month, or from year to year, in the use of his lots; and the question to be determined in such an action is, how much has the rental or usable value of the lots been diminished by the construction, maintenance, and operation of the railway? As a basis for estimating the damages, the lots must be taken, *as they are used during the time embraced in the action*, and the plaintiff's recovery must be confined to the diminished rental or usable value of the lots just as they were. He was in no way prevented from putting his lots to any use he wished. He had the right, acting reasonably, not wantonly or rashly, to put upon them any structures which he deemed most to his advantage; and, at any and all times, until the railway company acquired as against him the right to maintain and operate its road in Fifty-third Street, he had the right to recover the diminished rental value of his lots occasioned to them, just as they were, by the maintenance and operation of the road. *But he could not be permitted to prove or allowed to recover such damages as he might have sustained if he had put his lots to other uses or placed upon them other structures. Such damages would be purely speculative and contingent.* The plaintiff had

(a) 101 N. Y. 98.

owned these lots for about twelve years before the railway was constructed without making any substantial improvements upon them, and they remained in the same condition down to the commencement of the action. It appears that at some time he made plans for the erection of dwelling-houses upon the lots; but whether he ever intended to build, or would have built the houses, is mere matter of conjecture. Upon the trial he was permitted to prove what it would have cost to erect the dwelling-houses upon the lots, and what they would have rented for after they were constructed, and also to give evidence of the amount for which they would have rented if the railroad had not been constructed; and the jury evidently took this evidence into consideration in fixing the amount of damages which they awarded the plaintiff. There can be no certainty that the plaintiff would ever have erected dwelling-houses upon the lots, and there could be no certainty as to the rents which could have been obtained from them either with or without the railroad in the street; and the defendant [plaintiff] was permitted by the rule adopted in the court below to have all the advantages which he could derive from keeping his lots substantially vacant and ready to sell as such, and at the same time to have all the advantages, without the investment of any money, and without any risk, which he could have derived from their improved condition. He was simply entitled to the damages caused to him in the use of his lots from the defendants' interference with his easements of light, air, and access, and such damages are necessarily, and from the very nature of the case, such only as flowed from the interference with such easements during the time covered by the action. If he desired a more ample indemnity for the injury he suffered from the railway in front of his lots, he should, by an equitable action, have compelled the defendant, either by agreement with him to pay his damages, or to acquire the right by condemnation proceedings to interfere with and take his easements. Any other rule would open up on the trial in every case like this an inquiry into all the possible uses to which the abutting owner might put his premises; and damages, instead of being awarded upon any certain or probable basis, would rest mainly upon conjecture and speculation."[a]

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[a] Tallman *v.* Metropolitan El. R.R. Co., 121 N. Y. 119, 124, citing Greene *v.* N. Y. Central & H. R. R.R. Co., 12 Abb. N. C. 124; Colrick *v.* Swinburne,

§ 1196. **Results of the cases.**—It follows from these cases that the plaintiff in a common-law action in the New York courts would be entitled to recover damages for the injury done to his property for the period allowed by the statute of limitations—in this class of cases six years; and that for any subsequent injury a new action must be brought; and that his measure of damages would be determined the *actual value of the past use;* but that by applying for equitable relief by way of injunction at the same time, he obtains a judgment which enables him to recover as for a permanent injury; that is, the right to the injunction is used by the court to compel the defendant to come to terms with the plaintiff. In practice this has been done by means of a settlement transferring to the defendant the easements invaded, in consideration of a sum supposed to represent the permanent depreciation of the value of the property. In this somewhat circuitous way do these decisions effect the object of the constitution by compelling a "just compensation" for "taking private property." We have seen that in the Pond case the Court of Appeals intimated that it might be productive of less inconvenience if a rule giving the full value of the depreciation in a common-law action could be adopted. It may be well to state here that one inconvenience produced by the rule is, that in case of the transfer of property affected by the elevated railroads, as the decision in the Pond case has been generally understood, the vendee, on the principles adopted, acquires the right to all future damages, the vendor retaining only such as may have accrued during the past six years. There cannot be much doubt that

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105 N. Y. 503; 8 N. Y. State Rep. 172; Wheelock *v.* Noonan, 108 Id. 179; 13 N. Y. State Rep. 110; Hatfield *v.* Central R.R. Co., 33 N. J. Law 251; Dorlan *v.* East Brandywine & W. R.R. Co., 46 Pa. 520.

this has produced much practical injustice. The vendor has really suffered the whole damage, and sells the property at a price reduced by the effect of the construction and operation of the road. The vendee, on the other hand, buying at a reduced price, gets practically the benefit of the whole claim for damages, for he has the right to the injunction and to compel the railroad to pay him the full value of the easements. In other words, the result is that in case of a sale, the right to the lion's share of the damages is acquired without consideration by one who has suffered no injury, but bought the property as it stands subject to the effect produced by the road, while the previous owner, who really suffered the wrong, loses all his rights. Thus far the question has not been directly decided by the Court of Appeals. It is not easy to see a way out of the difficulty. On the one hand it has been expressly decided that the abutter who brings a common-law action can only recover damages for the diminished value of the past use, while the vendee is the only person who is entitled to an injunction. It may be that a fair view to take of the matter is the following: In case of a sale, at any rate if it can be proved that the price was affected by the establishment of the road, there can be no satisfactory evidence of any actual damage to the vendee, and the whole foundation for the interposition of equity in his interest is, therefore, wanting. Or, if he has a right to an injunction and damages, he can recover only nominal damages. It may be that equity if invoked would only allow him to recover damages for the benefit of his vendor. In the Henderson case, as already explained, the *vendor* who had reserved the right to damages, recovered in full. Of course both vendor and vendee cannot recover for the same damage.

§ 1197. **Rule of damages as affected by benefits.**—When the statute, as in New York, expressly forbids the allowance of benefits, it becomes important to ascertain how this provision is to be given effect—what rule of damages can be framed which shall include all the loss occasioned by the improvement, and at the same time not diminish this loss through an application of the benefits occasioned by it, but which the statute says shall not be allowed to redeem it. In New York the constitution, as we have seen, provides that compensation must be given where property is "taken." Under the rules laid down in the elevated railroad and other recent decisions, this is extended in a very large class of cases, so that property includes incorporeal hereditaments such as easements in a street. These are held to be taken *pro tanto*, whenever they are interfered with or obstructed in such a way as to diminish the beneficial use and value of the land to which they are attached. The owner may first bring an action from time to time and recover as in an action of trespass or case for the injury done down to the time of bringing suit; or 2d, he may bring an action for an injunction and have his entire damages assessed as a condition for the dissolution of the injunction; or 3d, he may (if the defendant acquiesces) even get full damages in a common-law action, without applying for an injunction; or 4th, condemnation proceedings may be instituted which terminate in the transfer of the property taken on payment of an equivalent.

In the first of these cases the measure of damages should on principle be the same as in a common-law action of trespass. The owner should recover the amount lost through the trespass or nuisance down to the date of the writ. In cases where the trespass consists of an interference with incorporeal hereditaments, this will generally

be measured by the decrease of rental value, and such seems to be taken by the New York courts to be the absolute measure of recovery. But the diminution in rental value is really only evidence of the loss, not the necessary measure of the loss.

In the remaining cases the New York courts treat the measure of damages as being the difference in value of the property unaffected by the improvement and its value as affected; for this, they say, is equivalent to the permanent diminution in value caused by the trespass treated as an act continuing in perpetuity. It is obvious that either form of the rule involves a consideration of benefits at some point, and the manner in which the subject has been treated is somewhat peculiar. As the statute relates only to condemnation proceedings, there might be two rules of damages, one where damage to the fee is recovered in a common-law action (as in the Lahr case) or in an equity suit, and one where proceedings are taken to condemn. At common law, as we have already seen, the question whether benefits are to be considered depends simply on whether the damage is actually reduced by them. Under the statute they are to be excluded, whether or no. But there is no trace of this distinction in the cases. The decisions seem to proceed on the theory that one rule of damages is to govern all these cases, and that benefits are to be excluded. The method of computing damages in practice has been to ascertain, first, the present value of the property (the time of the trial being regarded as that of the taking), which is, generally, the value as affected by the railroad; second, the value which the property would have if unaffected by it, or with the easements. This is got at by taking testimony as to the course of rents and prices in similarly situated properties (in parallel or adjoining streets or avenues). The difference between

these two is the measure of damages. What are called general benefits in a certain sense are excluded by this process, because they appear, together with every other cause which has affected the property, on both sides of the account.

§ 1198. **Construction of the benefit statutes.**—The statutes affecting the elevated railroads ([a]) provide that there shall be no allowance or deduction for any *real or supposed benefits* which the party in interest may derive from the construction of the railroad. In Newman *v.* The Metropolitan Elevated Railway Co.,([b]) which seems to have been a case which, like the Lahr case, was tried in such a way as to enable the plaintiff to recover in one sum the whole damages, on the assumption that the defendants' structure caused a permanent impairment of the easements of light, air, and access, the court was requested to charge that in estimating the damages to the plaintiff's leasehold interest, the jury might take into consideration "any benefits peculiar to his house which have arisen by the construction of the road, as shown by the evidence," and the defendants gave evidence tending to show that the location of a station near by had caused the first floor of the building to become more valuable for business purposes. The Court of Appeals granted a new trial. An elaborate opinion was delivered by Brown, J., who said that the owner, according to the settled rule of the State, recovered, first, the value of the land taken; and, second, a fair and adequate compensation to the residue; that the first element represents the damages for land actually taken, the second the consequences *of the construction of the road upon property not taken.*

([a]) L. 1875, c. 606, § 20; L. 1850, c. 140, § 16; L. 1872, c. 885, § 3.
([b]) 118 N. Y. 618.

"Such damages are wholly consequential, and to ascertain them necessarily involves an inquiry into the effect of the road upon the property, and a consideration of all the advantages and disadvantages resulting and to result therefrom." In other words, no deductions for benefits can be made from the value of *land taken*, but

"in considering the question of damages to the remainder of the land not taken, the commissioners must consider the effect of the road upon the whole of that remainder, its advantages and disadvantages, benefits and injuries, and if the result is beneficial, there is no damage and nothing can be awarded. . . . .

"The easement is the property taken by the railroad company. But in estimating its value it is impossible to consider it as a piece of property, separate and distinct from the land to which it is appurtenant, and the right of the property-owner to compensation is measured, not by the value of the easement in the street separate from his abutting property, but by the damages which the abutting property sustains as a result or consequence of the loss of the easement.

"It follows that in making an award to a party situated as the plaintiff was with reference to the defendants' railroad, there would be no compensation for property taken beyond a nominal sum, and that his right to recover would rest chiefly upon proof of consequential damages.

"An estimate of such damages, as I have already shown, involves an inquiry into the effect of the railroad upon the whole property, and a consideration of all its advantages and disadvantages. If the rental value of the whole building was shown to have been diminished, there was injury for which plaintiff was entitled to recover; but if the diminished rental value of the upper floors was equal or overcome by increased rental value in the store, then there was no injury, and no basis for a recovery of substantial damages against the defendants." [a]

The court cited several cases,[b] and inquired how, if,

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[a] Newman *v.* Metropolitan El. Ry. Co., 118 N. Y. 618, 624, 625.

[b] *Re* Brooklyn El. R.R. Co. *v.* Phillipps, 55 Hun 165; Drucker *v.* Manhattan Ry. Co., 106 N. Y. 157; Page *v.* Chicago, M. & St. P. Ry. Co., 70 Ill. 324; Oregon Central R.R. Co. *v.* Wait, 3 Oreg. 91.

as in the Drucker case, evidence was admitted of the falling off of business in the street, evidence of an increase in business effected by the railroad could be excluded. What is the effect of this decision? In the case of Brush *v.* The Manhattan Railway Co.,(a) it seems to be inferred in the Court of Common Pleas that the Court of Appeals has by the Newman case made it necessary that *any* benefits derived from the operation of the road should be allowed for. If this is so, the statute, whenever no land is taken, is completely nullified, but it should be noticed that the Newman case was a common-law action (like the Lahr case), in which damages were to be recovered once for all. Hence there was necessarily involved in it no question of the application of the benefit statutes whatever; and while in such an action there is no reason why *all* benefits should not be allowed for, everything said in the decision about the application of the benefit statutes is strictly *obiter;* and as Brush *v.* Manhattan Railway was an equity proceeding, in which the statute might be by analogy invoked, there is no apparent connection between the two cases. In other words, in any common-law action, common-law principles should be applied; these, as we have had occasion to point out, seem to involve the allowance of such benefits as spring from the same cause which is treated as the cause of the damage. But in condemnation proceedings or an equitable action proceeding in analogy with condemnation proceedings, when the property taken (the easements) are to be paid for, general benefits must be excluded in some way, or the statute in so far deprived of all force. The statute, as has been already said, contains nothing about "general" or "particular"

(a) 13 N. Y. Supp. 908.

benefits, but excludes from consideration *all benefits, real or supposed.*

In examining the question as to benefits, the following considerations should not be overlooked. It appears very clearly from what has been already said, that the policy of all benefit statutes is to prevent the injustice which would follow from offsetting benefits in the case of the land-owner whose property is taken, when they are not offset in the case of him whose property is not taken. There is no dispute about this where land is taken, and it is difficult to see how the courts can nullify the statute in the case where easements are taken. All the equity and condemnation proceedings against the elevated railroads proceed on the theory that the railroads are "taking property." Common-law actions for past damages, or common-law actions like the Lahr and Newman cases to recover damages once for all, do not. The Newman decision is no doubt entirely right; but the reasoning of the decision would defeat the policy of the statute, which was aimed at all general benefits. To make an allowance for the general improvement produced by the road would make him whose easement is taken pay for benefits of which his neighbor in the adjoining street gets the advantage for nothing. No doubt it is a difficult case for the application of the statute, but this is hardly a reason for nullifying it altogether.

§ 1199. **Avoidable consequences.**—If the rule of avoidable consequences applies in this class of cases, the measure of damages may sometimes be the expense of restoring the property to the condition which it originally had.[a] In the Matter of New York, Lack. & W. R.R. Co.,[b] the railroad took land used as a training track,

[a] Matter of N. Y., W. S. & B. R.R. Co., 29 Hun 646.
[b] 29 Hun 3.

and the court, while adopting the rule of the difference in market value, said that in this case the true measure of damages was "what it would cost to make another training track."

The application of the rule of avoidable consequences does not seem to have been much considered in the elevated railroad cases. In one case,[a] an action to recover for temporary damages, it was suggested that the only damages proved as the result of the diminution of the easement of light, was the cost of additional gas. The question might come up in another way. When the railroad diminished the light coming to a single window, and it appeared that the owner might, by opening another window, obtain as much light as before, would his measure of damages be the cost of doing this? We have already seen[b] that in the ordinary case of trespass, the rule is usually *either* the cost of restoring the premises to their former condition, or the amount of the injury measured by the diminution in market value—whichever is the lesser amount; and this is in accordance with what we take to be the true view of the rule—that it is deduced from and a corollary of the rule excluding such damages as are not proximately caused by the act complained of. Suppose, for instance, that the trespass consists of the breaking of all the windows of a house. If the damage is treated as permanent, the diminution in value would be very serious. The house would be nearly uninhabitable; it would be exposed to the elements in such a way as to render its value very much less than a corresponding house with the windows unbroken. But the windows can all be mended at once at a compar-

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[a] Fifth Nat. Bank *v.* New York El. R. Co., 24 Fed. R. 114; 24 Bl. C. C. 89.

[b] § 939.

atively trifling cost, and the law supposes that the owner, acting as a reasonable man, will have them mended. If he does this, he can recover what it has cost him to mend them; for this, and not what might have happened otherwise, is the measure of his loss. If he does not, he still can recover no more, for whatever additional damage has been caused, is the result of his own wilful act or neglect.

But the cases of the elevated roads present a different question. In all those cases in which application is made to the court for an assessment of permanent damages, as for an injury to the fee, the cause of action is really not a trespass, but properly a *taking* of what the courts have decided to be property, *i. e.*, the easements of light, air, and access. If proceedings to condemn are instituted, the result is the same. Property is taken, and "just compensation" must be made. But here there can hardly be any question of avoidable consequences. Although the taking is said to begin in a trespass,(a) it is treated as resulting in an absolute deprivation of property; and where an owner is deprived of property, like an easement, it would be going rather far to hold him bound to acquire by his own efforts a new easement to take the place of the first, especially when the constitution gives him a right to compensation in full. These considerations would seem to point to the conclusion that it is only in actions against the elevated roads for temporary damages that the rule of avoidable consequences could be invoked.

§ 1200. **Right of action not dependent on time when title acquired.**—As the right to recover for future damages

(a) The use of the term trespass in these cases seems rather unfortunate. Trespass, *q. c. f.*, does not lie for the infringement of an easement; this being an incorporeal hereditament, the action must be on the case.

depends upon the interference with and appropriation of easements appurtenant to and running with the land, it can make no difference whether the plaintiff acquired title before or after the building of the road. As already explained, though the question has not been finally passed upon by the Court of Appeals, the vendor of land affected may have an action for past damages, but the vendee and present owner has the right to an injunction, and through this may recover all permanent damages, as for an appropriation. The fact that he bought at a price depreciated by the existence of the obstruction, and that his vendor may have lost in this very depreciation a sum corresponding with the total damage, has not been treated as affecting the question.(a)

§ 1201. Different interests.—In actions for damages, one by tenant by the courtesy and the other by the remainder-man, the court will give damages for the whole fee, and the judgment will apportion this amount between the two interests according to the annuity tables.(b) The question of recovery as between landlord and tenant presents many difficult questions which have not been finally passed upon. On general principles there seems no reason why damages should not be given for injuries to reversion,(c) although the reversioner is out of possession. It seems to be generally assumed that the tenant who has a lease dated since the operation of the roads can recover nothing, since he takes the property as it stands.

(a) Glover *v.* Manhattan Ry. Co., 51 Superior Ct. 1; Werfelman *v.* same, 32 N. Y. St. R. 682 (C. P. G. T. 1890); Johnston *v.* same, Ib. 685.

(b) Thompson *v.* Manhattan Ry. Co., 24 St. R. 498.

(c) See Werfelman *v.* Manhattan R. Co., 32 N. Y. St. R. 682; Mortimer *v.* Manhattan R. Co., 57 N. Y. Super. Ct. 509; Hamilton *v.* N. Y. El. R. Co., 30 N. Y. St. R. 17; Kearney *v.* Metropolitan El. R. Co. (Super. Ct. Sp. T.); Welsh *v.* Metropolitan El. R. Co., 57 N. Y. Super. Ct. 408; Conkling *v.* Manhattan Ry. Co. (S. C. G. T.) Nov. 1890.

We may remark in passing that this throws rather a strong light on the injustice of allowing the vendee, who also takes the property as it stands, to recover as if he were the original owner.

§ 1202. **Past and future claims not merged by assignment.**—In a case in the Superior Court it appeared that subsequent to the beginning of the action for an injunction the plaintiff conveyed the property to his wife. The action was then tried, but before any decision was rendered he also transferred to her his claim for *past* damages. The wife then applied to be substituted as plaintiff, and it was held that this could be done on terms, but that the trial already had must be treated as a nullity, and that the cause of action for future and for past damages must be severed.([a])

§ 1203. **Rental value the rule though plaintiff occupies premises.**—In all these cases the rental value of the property is the true measure of the value of the use of which the plaintiff has been deprived in the past. It is no objection that the plaintiff occupies the premises himself. In Woolsey *v.* New York El. R.R. Co.,([b]) the Supreme Court said: "The discomforts arising from the trespass are to be compensated for, and simply because an owner does not choose to abandon his premises, but continues to occupy the same, in no way deprives him of this right to compensation, and there is no more accurate way in which the money value of such discomforts can be measured than by showing how the rental value of the premises has been affected by the erection and maintenance of the nuisance." ([c])

([a]) Senft *v.* Manhattan R.R. Co., 57 N. Y. Super. Ct. 417.

([b]) 31 St. R. 91.

([c]) The court cited Francis *v.* Schoellkopf, 53 N. Y. 152, and Michel *v.* Board of Supervisors, 39 Hun 47.

§ 1204. **Suitableness of property for business.**—In showing the market value and the consequent impairment by the taking of an easement, the owner may show the particular suitableness of the property to any given business, as in the case of a laundry where the building of the railroad cut off light, and the drippings from that structure ruined the clothing when it was being loaded in wagons.([a])

§ 1205. **Loss of profits—Falling off of trade—Certainty.**—As the measure of damages is the diminution of the value of the use, or rental, no recovery can be had by lessees for loss of business estimated on the diminution of net receipts, nor for amounts expended by plaintiffs in improving the premises and adapting them to their business.([b]) While this is in accordance with general principles, at least if we suppose that by rental value the court meant the difference between the rent received and the value of the lease, yet it is hard to see how the value of the lease can be arrived at without taking evidence as to the profits of a business carried on there. The court treats this as too remote; but proof of the profits of an established business is not generally regarded so. Evidence of improvements made by plaintiffs was admitted, and also evidence of the uses to which the premises were or could have been put, in the condition they were in.

In Drucker *v.* Manhattan Ry. Co.,([c]) evidence was offered that since the building of the elevated road the trade and business of the street had fallen off, and the current of custom had largely lessened in volume, and changed in character. It was held that this was competent, although the evidence also tended to show that

([a]) Matter of the Union El. R.R. Co., 55 Hun 165.
([b]) Taylor *v.* Metropolitan El. Ry. Co., 50 N. Y. Super. Ct. 311.
([c]) 106 N. Y. 157.

this result was partly due to a tendency of business to move to another quarter, with which the elevated roads had nothing to do. In answer to the objection, that this left the jury to guess and speculate in reaching a result, the court said :

"It is often the case that damages cannot be estimated with precision, and the basis of accurate calculation is wanting and inadequate. That is notably true in many cases of personal injuries. Such evidence as can be given should be given, and facts actually tending to elucidate the extent of loss should not be withheld. But when all the proof, which, in the nature of the case, is fairly possible, has been given, the good sense of a jury must provide the answer, and it is no defense that such judgment involves more or less of estimate and opinion, having very little to guide it."

In a somewhat similar case, where the evidence showed that the street had been a market-stand for farmers, that this sort of business had left it and gone elsewhere, and in consequence rents fell off considerably. The court left it to the jury to say whether the difference in rent of the property affected was due to this cause or to the railroad, and on appeal the charge was held correct.(a) In Stein *v.* Metropolitan El. Ry. Co.(b) it was held by the Supreme Court that one of the elements of damage was the possibility that in the future a station might be erected in front of the plaintiff's lot.

§ 1206. **Judgment generally a bar to further actions.**— It follows from what we have said that as a general rule, where the plaintiff has recovered judgment for damage to the fee (either through the defendant's acquiescence, in a common-law action, or under the Uline case in an equity action), this will bar all persons acquiring title

(a) Moore *v.* N. Y. El. R.R. Co., 15 Daly 510.
(b) 21 State Rep. 71.

from him from further suits. But circumstances may operate to make even this bar ineffectual. Thus, plaintiff in such an action died, and the action was revived by his executors, who recovered a judgment for permanent injury, which was paid in full. Subsequently, in an action for partition, it was decided that the will was not valid, and the premises were sold to A. B. Upon this state of facts, it was held that the executors having had no title whatever, the recovery and satisfaction of the judgment in no way affected the real estate, and conferred no rights to the easements which would bar a new action by A. B. for damages.(a)

§ 1207. **Form of judgment—Protection of mortgagees.**—The result of these cases is that where the plaintiff may obtain two different judgments. If he sues at law for past damages, he recovers judgment down to the trial of the action (within the statutory period); but if he also applies for an injunction, he proves his entire damages, future as well as past, and the court decrees that in case of a tender to him by the defendant, within a specified time, of a sum equal to all the damages proved, he shall deliver to the defendants a conveyance, and a release of all future damages.(b) And where the defendants had neglected for ten or twelve years to institute condemnation proceedings, it is no error for the trial court to refuse to direct that the injunction should be conditioned upon the failure of the defendants to institute condemnation proceedings.(c) Provision must be made in such a judgment for protection of defendants from an outstanding mortgage title, but not if the mortgagee be-

(a) Mitchell *v.* Metropolitan El. Ry. Co., 56 Hun 543.

(b) See Stirn *v.* Metropolitan E. R. Co. (Sup. Ct. 1889), 21 St. R. 71.

(c) Woolsey *v.* New York El. R.R. Co., 31 St. R. 91 (S. C. G. T. 1890).

comes a party, and so assents to the judgment.[a] A provision in the judgment, that compensation shall not be made until plaintiff shall deliver releases from himself and mortgagees, is an ample protection to defendant, notwithstanding an omission to bring in the mortgagees as parties in a proper manner.[b]

§ 1208. **Evidence.**—In this class of cases the attempt is often made to obtain, in the guise of evidence of value, opinions as to what the damages are. As a rule witnesses must always state facts, not opinions, and in the case supposed, opinions are the more objectionable as they interfere with the province of the jury. Therefore, it is improper to ask a witness, "What *would have been* the fair rental value of this property in the years 1879, 1880, and 1887 if the railroad had not been built?"[c] In Mitchell *v.* Metropolitan R.R. Co.[d] the case of McGean *v.* The Manhattan Ry. Co. was thus criticised by Barrett, J. :

"The court seems to have been of opinion that the question, if properly objected to, was inadmissible, citing Teerpenning *v.* Corn Exch. Ins. Co.,[e] and Marcly *v.* Shults,[f] but the judgment was nevertheless affirmed, substantially upon the ground that the defendants were not prejudiced. The same reasoning is, *a fortiori*, sufficient to support the present judgment, for this cause was tried as an equity case by the court at special term, while the McGean case was a common-law action tried by a jury.

"The learned judge who tried the case at bar was certainly

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[a] Woolsey *v.* New York El. R.R. Co., 31 St. R. 91.

[b] Hughes *v.* Met. El. R.R. Co., 57 Super. Ct. 379; Giordano *v.* Manhattan Ry. Co., 31 N. Y. St. R. 134 (S. C. G. T. 1890).

[c] McGean *v.* Manhattan Ry. Co., 117 N. Y. 219; *cf.* Teerpenning *v.* Corn Exch. Ins. Co., 43 N. Y. 279; Marcly *v.* Shults, 29 N. Y. 346. In Thompson *v.* Manhattan R. Co., 29 St. R. 720, Bookstaver, J., said that "for a long time in nearly all these damage cases such testimony was admitted." See Roosevelt *v.* N. Y. E. R. Co., 57 Super Ct. 438; Crawford *v.* Metropolitan El. Ry. Co., 30 N. Y. St. R. 866; s. c. 120 N. Y. 624.

[d] 31 N. Y. St. R. 80, 83 (S. C. G. T. 1890).

[e] 43 N. Y. 279.

[f] 29 Id. 346.

not misled by the testimony thus elicited ; and this is especially clear from the manner in which he received it, namely, to quote his language, 'as one of the factors in the ascertainment of damages, reserving the question as to its application.' But for this opinion of the court above I should not have doubted the propriety of receiving such evidence. It is almost a necessity in this class of cases ; and frequently better evidence cannot be had, thus seemingly bringing it within the exception referred to by Allen, J., in Teerpenning *v.* Corn Exch. Ins. Co., *supra*. And I should have supposed that it was also admissible under rules laid down and upon principles enunciated in a great number of cases in this and other States.(a) Indeed, I am informed that the trial justices to whom very many of these cases have fallen at special term, have acted upon the understanding that the precise question had been put in N. Y. National Exch. Bk. *v.* Met. El. Ry. Co., and that such question had been approved by the affirmance of the judgment in that case.(b) It may be, however, that the appellate court deemed a stricter rule to be applicable in a common-law action for damages, such as the McGean case, than in equity suits for an injunction *nisi* involving final and complete compensation, such as the N. Y. National Ex. Bk. case, and such as the present. At all events, I see nothing in the opinion in the McGean case to require any change in the conclusion already arrived at here."

In Sixth Ave. R.R. Co. *v.* Metropolitan E. Ry. Co.(c) it was held that evidence as to the manner and extent of the injury to property of *other owners* is inadmissible, and that a witness cannot be asked to testify to what uses the property might advantageously be put if the elevated railroad were not there.(d) No reason is given ex-

(a) Citing Clark *v.* Baird, 9 N. Y. 196; The People *v.* McCarthy, 102 N. Y. 639; 2 N. Y. St. Rep. 546; Matter of City of Rochester, 40 Hun 588; 2 N. Y. St. Rep. 264; Conhocton S. R. Co. *v.* Buffalo, N. Y. & E. R.R. Co., 3 Hun 523; Rochester & S. R.R. Co. *v.* Budlong, 10 How. Pr. 290; Reed *v.* Rome, W. & O. R.R. Co., 48 Hun 231; 16 N. Y. St. Rep. 58; Beir *v.* Cooke, 37 Hun 38.

(b) 108 N. Y. 660.

(c) 56 Hun 182.

(d) Sixth Ave. R.R. Co. *v.* Metropolitan E. Ry. Co., 56 Hun 182.

cept that such testimony is speculative. As has already been explained, there seems no reason or principle why, in suits for the fee value, such testimony should not be received. In condemnation proceedings the rule is well settled that the commissioners are not to be governed in the receipt of evidence by the strict rules obtaining in a court. Indeed, the statute says that they shall not be. They may go and view the premises and upon the knowledge thus acquired base their award.([a])

§ 1209. **Condemnation proceedings.**—We have already seen that in the Story case,([b]) the court suggested that the defendant road might acquire the right to the easements affected, or in other words "take" the property under the constitution by condemnation proceedings. It was subsequently decided In the Matter of the Metropolitan Elevated Ry. Co.,([c]) that this might be done even when actions for damages were pending, and though the roads were in operation.([d]) And it has been held in the Superior Court that the fact that the judgment in an injunction suit fixes the value of the easements on payment of which the injunction should cease to operate, at a greater sum than that awarded in condemnation proceedings, does not prevent the suspension of the injunction on payment of such award.([e])

§ 1210. **In the Federal courts.**—The questions presented by the elevated railroads have been discussed in a case in the U. S. Circuit Court of New York.([f]) On the

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([a]) Matter of the New York El. R. Co., 29 St. R. 190 (S. C. G. T. 1890).

([b]) Story *v.* N. Y. El. R.R. Co., 90 N. Y. 122.

([c]) 18 St. R. 134 (Supr. Ct. Sp. T.) Oct. 1, 1888.

([d]) *Acc.* Metropolitan E. R. Co. *v.* Dominick, 55 Hun 198, Barrett, J.

([e]) Watson *v.* Metrop. El. R.R. Co., 57 N. Y. Super. Ct. 364, 376.

([f]) Fifth Nat. Bank of N. Y. *v.* New York E. R. Co., 24 Fed. Rep. 114; 24 Blatch. 89.

first appeal of the case, which was an action at law, the view taken by Shipman, J., was that it had not been sufficiently clearly left to the jury to say whether there was any new or inconsistent use imposed upon the street. On a second appeal a new trial was refused. It was held that under the circumstances of the case the plaintiff could recover damages accruing after the commencement of the action, and that the measure of damages was the diminution in the value of the use of the part of the building affected. The decisions in the Story case, and in Baltimore & P. R.R. Co. *v.* Fifth Baptist Church,[a] were followed. The case went to the Supreme Court of the United States, where the judgment was affirmed.[b] It was held that the law of the State of New York was that in an action for past damages the plaintiff could only recover down to the commencement of the action; but that the defendant having acquiesced in a recovery down to the time of trial could not now object; that the judgment might be a bar to any subsequent action, at least for damages suffered before that time; but the point not being before the court, was not decided.

§ 1211. **General conclusions.**—We have endeavored in the foregoing chapter to do little more than give an intelligible account of the curious course of decision in a single jurisdiction. The cases suggest almost as many new questions as they answer. How is it possible, for instance, to define the nature of the right of action in these cases? If it is wholly equitable, how does the right to an injunction enable the court to prevent the injunction issuing if the party applying for it desires it? If the defendant instead of paying the fee damages in a

[a] 108 U. S. 317.

[b] New York E. R.R. Co. *v.* Fifth Nat. Bk., 135 U. S. 433.

given case submitted to the injunction, or if the plaintiff insisted on having it issued, what would happen? The fundamental difficulty is one which may be stated in a variety of ways, but in the last resort consists in the impossibility of reconciling two wholly opposite views, one being that what the legislature authorizes cannot be a nuisance, and that its interference with private property short of an absolute divestiture of title is *damnum absque injuriâ;* the other being, that whatever injures property is *pro tanto* a taking of it. To reconcile these views at this late day by any new suggestion may seem hopeless; nevertheless, in the discussion we venture to think that one point has been generally overlooked. That is, that there is no warrant in the principles of our law for the doctrine that the legislature can give any one a *higher* right to injure others than can be derived from the common law itself. All rights of property derived from the common law are enjoyed under the limits imposed by the maxim, *Sic utere tuo, ut alienum non lædas.* The legislature can give no higher rights. Consequently while it can authorize the doing of various acts by grantees of franchises, such as the building of railroads, canals, etc., the rights they enjoy are still subject to the limitation under which every one owns property—that he must not injure others. A private owner of property is sometimes said to have absolute rights in it; but this is an entire mistake. If he uses it so as to produce a trespass or create a nuisance, he must respond in damages. Why not the grantee of a franchise? It is said, because he derives his power to injure from the legislature. But from whence does the legislature derive its power to absolve the incorporators of a railroad from responsibility for the *consequences* of their acts? It may no doubt authorize a railroad to be built through the streets of a popu-

lous city, but if the necessary result of the use of that power is to damage the owners, the result is a nuisance. The railroad is not a public nuisance, and cannot be enjoined; but the illegal consequences of the enjoyment of the powers granted would seem to be actionable none the less because the legislature granted the powers. If these views are sound there is no reason why, the injury being permanent and necessarily so, the damage should not be paid for once for all in a common-law action, nor why the fiction should be resorted to that the plaintiff has a right to enjoin the defendant from enjoying the powers conferred upon it by statute. Such has been the conclusion reached in jurisdictions other than New York, though not exactly in this way.

CHAPTER XL.

THE MEASURE OF DAMAGES IN SUITS FOR THE INFRINGEMENT OF PATENTS.

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1237. Entire profits sometimes recoverable.
1238. Method of estimating profits when recovery is not entire.
1239. Defendant's sales not usually criterion.
1240. Sales sometimes measure plaintiff's loss.
1241. Profits in excess of damages.
1242. Limits of account in equity.
1243. Burden of proof in equity.
1244. Interest on profits and license fees.
1245. Interest on expenses.
1246. Counsel fees.

§ 1212. Nature of rights under patent statutes.—The patent and copyright laws of the United States were consolidated in an act passed July 8, 1870.[a] The provisions of this act were subsequently adopted into the Revised Statutes.[b] The rights granted by the statute

[a] 16 U. S. St. 198.
[b] U. S. R. S., § 4883 *et seq.*

to patentees are the exclusive rights to make, to use, and to vend.(a) It is important in determining the measure of damages in any case to inquire which of these rights is infringed. The right to make is of itself seldom of any value; and, accordingly, in Whittemore *v.* Cutter,(b) Story, J., charged the jury that where the only proof of infringement was that the defendant had made one of the plaintiff's machines, but was not shown to have used it, only nominal damages could be recovered.

§ 1213. **Patents a species of property.**—A patent as between the government issuing it and the patentee is regarded both as a grant and as a contract. So far as regards the measure of damages for infringements it is treated as a species of property of an intangible and incorporeal nature. The damages are treated as injuries to proprietary rights, and the plaintiff, to put the rule on the subject in its most general form, is entitled to such reparation as will make up to him for the difference in the value of these rights as they are and as they would have been had there been no infringement. As in all other cases of property, the sum of the rights may be analyzed into their elements of value, and we may say that the infringement affects the right to use, to make, or to vend, or some of these, and evidence of the separate value of either one may become important. So we shall find that a license fee or royalty established in the case of a patent is treated as being like a market price in the case of other species of property; and throughout the whole subject, the courts apply, so far as possible, the ordinary rules for the measurement of damages to property rights.

§ 1214. **Patents protected both at law and in equity.**—The

(a) U. S. R. S., § 4884.
(b) 1 Gall. 478.

Revised Statutes give the patentee protection both at law and in equity. At law he is entitled to a jury trial, and recovers actual damages, which may be trebled in the discretion of the court in case of wanton injury.[a] In equity he is entitled to an injunction, and may in a proper case have an accounting of whatever profits the defendant can be shown to have derived from the infringement. Besides this, he may have his legal damages assessed in the same suit. The right to an account and the right to damages are so closely united in these statutes that in any discussion of the subject it is impossible to separate them. Prior to the enactment which gave the right to both legal and equitable relief in the same suit, suits at law were much more common than they now are. It is in equity suits that most of the discussion of the measure of damages at law is now to be found. But since, whether the relief administered be legal or equitable, the aim of the law is to give compensation, it is believed that for a complete view of the whole subject neither aspect of it can be neglected.

§ 1215. **Only actual damages recoverable.**—The statute provides that only actual damages shall be given ;[b] and it is well settled that only those which are proved can be allowed. If none are proved, only nominal damages can be given.[c] In Mayor, etc., of New York *v.* Ransom,[d] where the plaintiff's patent consisted of an improvement in a fire engine, and no license fee was shown, but the additional strength the invention gave to the engine, and the cost of attaching, were proved, Grier, J., said:

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[a] U. S. R. S. § 4919.

[b] U. S. R. S. § 4919.

[c] Philp *v.* Nock, 17 Wall. 460; Carter *v.* Baker, 4 Fish. P. C. 404; 1 Sawy. 512; Burdell *v.* Denig, 2 Fish. P. C. 588; Ingersoll *v.* Musgrove, 14 Blatchf. 541.

[d] 23 How. 487.

"The jury were allowed by the court to *infer* that the defendants have saved all the money indicated by the comparative powers of the engines, with and without the improvement; and after having made this inference, they may *presume* that the defendants would have paid this amount to the plaintiff for the use of his improvement. Thus, the possible advantage or gain made by the use of plaintiffs' improvement on their machines, is made the measure of his loss. If the plaintiffs, unable to furnish any other data for a calculation, had proved that the defendants had made a certain amount of money by putting out the fires in New York, which the plaintiffs would otherwise have made by use of their invention, he might with some reason contend that this was a proper measure."

In Blake *v.* Robertson,[a] where there was no license fee, and the plaintiff made a profit of $40 on each machine, but it did not appear how much of this was due to the infringed patent, and how much to others, it was held that, for lack of proof, he could only recover nominal damages. No one rule can be laid down which will govern all cases. The methods by which the patentee makes his profit, and by which the defendant infringes, must both be considered.

§ 1216. **License fees.**—In many cases, the patentee, by selling licenses, places a value upon one or more of his rights, and when that right is infringed, this value will furnish means for ascertaining the damages. A patent fee is, however, only evidence. In Sickels *v.* Borden,[b] where licenses had been sold at prices ranging between $250 and $500, and the plaintiff testified that they had been sold for this sum in order to introduce them into the market, Nelson, J., told the jury that they were not confined to those prices, but might consider the fact that it was difficult to introduce a patented article

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[a] 4 Otto 728; *cf.* Calkins *v.* Bertrand, 10 Biss. 445.

[b] 3 Blatchf. 535; *cf.* Campbell *v.* Barclay, 5 Biss. 179.

into the market, and that licenses were often sold below their true value. In Seymour *v.* McCormick (a) the plaintiff brought an action at law to recover for the infringement of an improvement in reaping machines. The plaintiff had granted to the defendant a license to make and vend machines with the patented improvement, the latter to pay the plaintiff a royalty of $10 on each machine. On the last 300 machines the defendant refused to pay the royalty, claiming that the patentee was not the first inventor of the improvement. Nelson, J., charged the jury that the plaintiffs could recover all the profits made by the defendants on the whole machine, on the presumption that the purchasers would have bought of the plaintiffs, if the defendant had not infringed. On writ of error, the Supreme Court said:

"The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted. A man who invents or discovers a new composition of matter, ... may find his profit to consist in a close monopoly. . . . . If he should grant licenses to all who might desire to manufacture his composition, mutual competition might destroy the value of each license. This may be the case, also, where the patentee is the inventor of an entire new machine. If any person could use the invention or discovery, by paying what a jury might suppose to be the fair value of a license, it is plain that competition would destroy the whole value of the monopoly. In such cases, the profit of the infringer may be the only criterion of the actual damage of the patentee. But one who invents some improvement in the machinery of a mill, could not claim that the profits of the whole mill should be the measure of damages for the use of his improvement. And where the profit of the patentee consists neither in the exclusive use of the thing invented or discovered, nor in the monopoly of making it for others to use, it is evident that this rule could not apply. . . . . Where an inventor finds it profitable to exercise his monopoly by selling licenses to make or use his improvement, he has himself fixed

(a) 16 How. 480.

the average of his actual damage, when his invention has been used without his license." (a)

It was held that the plaintiff could only recover the unpaid license fee. In Philp *v.* Nock (b) the defendant had made and sold a number of inkstands having a patent cover. The patentee granted licenses on payment of a royalty, and it was held that the sum of the royalties for the number of inkstands made was the measure of damages. Although in Seymour *v.* McCormick and Philp *v.* Nock this rule gave a just estimate of the damages, it is, in many cases, open to objection. A license fee is not conclusive. (c)

§ 1217. **Recovery of license fee may transfer title.**—A corollary derived from it is, that where the license fee is recovered it operates as a transfer to the defendant of the rights which purchasers obtain by payment of the license fee. (d) The reason given is, that where the patentee finds his profit in the sale of licenses, it is for his advantage that as many as possible should be sold. But this reasoning only applies where licenses are sold to all comers. Where the patentee, in addition to the sale of licenses, manufactures the patented article, or uses the patented process, he should have power to limit the sales. In such a case, a forced transfer of a perpetual right to use the process to all who choose to pay the price would destroy the value of his patent. Thus, in Earle *v.* Sawyer, (e) the plaintiff had sold a few licenses to make his machines, but his general source of profit was in the

(a) Seymour *v.* McCormick, 16 How. 480, 489, 490.

(b) 17 Wall. 460; *cf.* Hogg *v.* Emerson, 11 How. 587.

(c) Keller *v.* Stoltzenbaugh, 43 F. R. 378.

(d) Sickels *v.* Borden, 3 Blatchf. 535; Spaulding *v.* Page, 4 Fish. P. C. 641; S. C. 1 Sawy. 702; Perrigo *v.* Spaulding, 13 Blatchf. 389; Emerson *v.* Simm, 6 Fish. P. C. 281.

(e) 4 Mas. 1.

manufacture and sale of the machine. The plaintiff had made and used an infringement. Story, J., charged the jury that the price of the machine was not the measure, as the verdict did not transfer the right to use the machine to the defendant, but that the actual loss, as shown by the price of the machine, and the nature and extent of the use of the machine, must be considered in estimating the damages. It is to be noticed, that the only authority for the principle that the recovery of the license fee transfers title in Seymour *v.* McCormick, is in the broad language used by the court. In that case, the plaintiff had already granted to the defendant a right to manufacture and sell the patented machines, and although the action was in form one of trespass, for the infringement of the patent, the contract was a material element in the case. It should rather be looked upon as an action for the breach of the contract. In Suffolk Co. *v.* Hayden,[a] where there was no license fee established, the court held, that damages for the use of the invention did not transfer to the defendant the right to continue the use, and hence they could only be given for the period of infringement, but nothing was said as to the effect of a license fee. In Penn *v.* Bibby,[b] Sir W. Page Wood, V. C., said: "It has never, I think, been held in this court that an account, directed against a manufacturer of a patented article, licenses the use of that article in the hands of all the purchasers." Another objection to the rule giving the license fee as the measure of damages is, that it may compel the defendant to pay for a wrong he has never committed. The proper cases for applying the rule of license fees would seem to be those resembling Seymour *v.* McCormick and Philp *v.* Nock,

[a] 3 Wall. 315.
[b] L. R. 3 Eq. 308, 311.

namely, where the patentee finds his profit in charging manufacturers of the patented article a certain amount on each article made. The rights to make and to sell, and, as a consequence of the latter, the right to use, have in this case been infringed. By the sale, the infringer has put it out of his power to limit the use of the article, and he should therefore be held responsible for the value of that use until the expiration of the patent or the destruction of the article. By establishing a license fee or royalty on each article made, the patentee has fixed the joint value of the three rights, and this value is what should be recovered. This seems to be the rule in England.(a)

§ 1218. **Decree and satisfaction.**—In a suit in equity complainant claimed profits through sales. The machines having been sold by the defendants with guaranty of the right to use, they contended that their liability on the guaranty must be taken into account; but it was held that as, on a recovery and satisfaction, the right to use the machines sold would pass to the defendants, they could not be liable over on their guaranty; their guaranty did not affect their liability to account, and a decree was made for the profits.(b)

On a suit being brought by the same plaintiff against the vendees of the infringer, it appeared that there had been a levy, which was *prima facie* a satisfaction. The vendees insisted that the mere taking of a decree for profits ratified the sale, and operated to pass the title; the complainant contended that there might be damages beyond the profits. On a motion to dissolve the injunction the court did not think that a full determination of these questions was necessary, but said that as the com-

(a) Penn *v.* Jack, L. R. 5 Eq. 81.

(b) Steam Stone Cutter Co. *v.* Windsor Mfg. Co., 17 Blatch. 24.

plainants had waived the tort, and proceeded for the money (the profits), this was like suing in *assumpsit*, and the measure of damages was the amount of money received, and nothing beyond. And the injunction was dissolved.(a)

§ 1219. Nominal damages do not operate to transfer title.—In Blake *v.* Greenwood Cemetery,(b) an action brought to recover for the use by defendant of a stone-crushing machine, it appeared that the machine in question was one of four which formed the subject of an action previously instituted by the same plaintiff against the manufacturers, in which suit a decree for an injunction and one dollar as nominal damages was entered. This sum, together with the amount of taxed costs, had been tendered by defendant, but refused by plaintiff. The defendant now contended that this former recovery and tender was a bar to any action against the user, but the court said that such was not the law; that the two infringements, by the maker and by the user, were separate trespasses, and judgment because of one is no bar to an action for the other. "To create a bar there must be satisfaction, and nominal damage is not satisfaction."

The true doctrine has been said to be that, while the patentee, if he chooses, may confine himself to a recovery for past infringement, yet if he elect as his measure of damages the full license fee established by himself, the payment thereof operates to vest in the defendant the right to the machine during the life of the patent or until that particular machine is worn out.(c) To put the

(a) Steam Stone Cutter Co. *v.* Sheldons, 15 F. R. 608.

(b) 21 Blatch. 222.

(c) Stutz *v.* Armstrong, 25 Fed. R. 147; *citing* Sickels *v.* Borden, 3 Blatchf. 536; Suffolk Co. *v.* Hayden, 3 Wall. 315; Spaulding *v.* Page, 4 Fish. 641; Emerson *v.* Simm, 6 Fish. 285, 286; Birdsall *v.* Coolidge, 93 U. S. 64; Birdsell *v.* Shaliol, 112 U. S. 485.

matter beyond doubt, it seems that in equity the decree may be framed so as to assure to the defendants the future use.[a]

§ 1220. **License fee for right to use.**—The next class of cases to be considered is, where the patentee has established a license fee for the right to use. This may be either by charging a royalty for each article made by the machine or process, or by charging one sum for their use, the licensee making the machine for himself, or by manufacturing and selling the machine. In the first case, the rule of license fees could be applied, and the measure of damages would be the royalties on all the articles made. In the other two cases, it would be the value of the use during the time the infringement lasted.[b] The license fee having, however, been established for the right to use the invention as long as the article lasts, this should not be taken as the measure of damages, but it serves as evidence to aid in determining the value for the time it has been used by the defendant.[c] There are, however, some cases which hold that this license fee is the measure of damages.[d] In Sanders *v.* Logan,[e] in a suit in equity before Grier and McCandless, JJ., it was held that the license fee could only be recovered, and as this could be recovered in an action at law, the bill must be dismissed, Grier, J., saying:

"The only injury to the plaintiff's rights exists, not in using his invention, for it is his interest that all mills should adopt and

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[a] Stutz *v.* Armstrong, *ubi supra*.

[b] See Whittemore *v.* Cutter, 1 Gall. 478; Parker *v.* Hulme, 1 Fish. P. C. 44; Wintermute *v.* Redington, 1 Fish. P. C. 239; Bell *v.* Daniels, 1 Fish. P. C. 372.

[c] *Cf.* Suffolk Co. *v.* Hayden, 3 Wall. 315.

[d] Sickels *v.* Borden, 3 Blatchf. 536; Spaulding *v.* Page, 4 Fish. P. C. 641; 1 Sawy. 702.

[e] 2 Fish. 168.

use it, provided he is paid the price of a license. Such price or value of a license is the true measure of the 'actual damage' suffered, and of the remedy which the patentee can obtain, or has a right to claim." (a)

In Packet Co. *v.* Sickles (b) the defendants had used the plaintiffs' invention under an agreement to pay for it, but no price was fixed. The plaintiffs had sold many licenses, but claimed to recover the "saving" to the defendants. The court said:

"In the case of Seymour *v.* McCormick,(c) this court, on full consideration, and without dissent, laid down the proposition that in suits at law for infringement of patents, where the sale of licenses by the patentee had been sufficient to establish a price for such licenses, that price should be taken as the measure of his damages against the infringer. The rule thus declared has remained the established criterion of damages in cases to which it was applicable ever since."

The decision of the court was, however, only to the effect that *no more* than the license fee could be recovered, the court below having refused to restrict the jury to this amount. But in Birdsall *v.* Coolidge,(d) where the patentee was accustomed to sell the right to make and use his invention for $100 for each machine, Clifford, J., said:

"Frequent cases arise where proof of an established royalty furnishes a pretty safe guide, both for the instructions of the court and the finding of the jury. Reported cases of undoubted authority may be referred to which support that proposition; and yet it is believed to be good law, that the rule cannot be applied without qualification, where the patented improvement has been used only to a limited extent and for a short time, but that in such a case the jury should find less than the amount

(a) See Livingston *v.* Jones, 2 Fish. 207.
(b) 19 Wall. 611, 617.
(c) 16 How. 480.
(d) 93 U. S. 64, 70.

of the license fee; and it is admitted in several cases that the circumstances may be such that the finding should be larger than the royalty.[a] Evidence of an established royalty will undoubtedly furnish the true measure of damages in an action at law, where the unlawful acts consist in making and selling the patented improvement, or in the extensive and protracted use of the same, without palliation or excuse; but where the use is a limited one, and for a brief period, as in the case before the court, it is error to apply that rule arbitrarily and without any qualification."

Where the patentee finds his profit in manufacturing and selling his patented article, the difference between the cost of manufacture and the price at which the article is sold is the license fee for the right to use. Where, therefore, the infringer makes and sells the patented article, the first item in the damages will be this profit. But as the wrong-doer also infringes the rights to make and to sell, damages must be given for these. The latter items would be generally damage to the plaintiffs' business. In Wilbur *v.* Beecher,[b] an action for an infringement by manufacture and sale of a bark-grinding machine, Nelson, J., told the jury that the plaintiff was entitled to all the damages which he had sustained by the defendant's use of the plaintiff's property, and that the data from which they must estimate the damages were the number of mills made, the cost of making them, and the price at which they sold. From the difference between the last two must be deducted something for interest on capital, risk of bad debts, and expense of selling. And in Pitts *v.* Hall,[c] in one of the same class of cases, the jury were told that they must

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[a] Citing Seymour *v.* McCormick, 16 How. 490; Livingston *v.* Woodworth, 15 Id. 560; Dean *v.* Mason, 20 Id. 203; Curtis on Pat., 4th ed. 459.

[b] 2 Blatch. 132.

[c] 2 Blatch. 229.

determine the amount of the profits that the plaintiff would have made had the defendant not sold these machines, and might consider the actual profits made by the defendant; but that they must also consider that the defendant might have sold at lower prices than the plaintiff. In Carter *v.* Baker,[a] Sawyer, J., charged the jury that "the profits made by the defendants in selling the machines are proper to be given as a part of the damages." He also said that the plaintiffs could have other damages besides the profits; that the defendants may have sold at a lower price than the plaintiffs; but the question was, whether the plaintiffs could have sold as many at the higher price, or at any price, as the defendants and plaintiffs together.

§ 1221. **Apportionment of license fees.**—It may be, as we have just seen, that the use by the infringer is a limited one or for a brief period, and in such cases it is said that the damages may be less than the license fees.[b] If such a rule were adopted it could hardly be that the verdict would transfer the title to the defendant. In a suit at law the question might prove a difficult one; in equity probably the power of the court to mould its judgment to suit the exigencies of the case would be quite sufficient to obviate anything of the kind.[c] In Willimantic Thread Co. *v.* Clark Thread Co.,[d] where there was an established license fee covering six claims, it was held (there being no proof of profits) that the relative value of the different claims must be ascertained, and the license fee apportioned.

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[a] 4 Fish. 404; 1 Sawy. 512; *cf.* Wayne *v.* Holmes, 2 Fish. 20.

[b] Birdsall *v.* Coolidge, 93 U. S. 64; Willimantic Thread Co. *v.* Clark Thread Co., 27 F. R. 865; Bates *v.* St. Johnsbury & L. C. R. Co., 32 F. R. 628.

[c] Stutz *v.* Armstrong, 25 F. R. 147.

[d] *Ubi supra.*

§ 1222. **License fee a species of market price.**—It is necessary in order to make a license fee a measure of damages to establish a regular price ;([a]) as in the case of sales of ordinary goods, they must be of frequent occurrence, in order to establish such a market price for the article as may be assumed to express, with reference to all similar articles, their salable value at the place designated. Hence infrequent sales of licenses, made at periods years apart, giving ground only for conjectural estimates, will not do. And so payment of a sum in settlement of a claim for infringement cannot be taken as a standard, like an established license fee.([b]) In the same way where the contract contains numerous conditions intended to secure the introduction of the patent, and providing for the return, in certain contingencies, of certain proportions of the royalty, all the facts must be examined to ascertain what the average license actually was.([c])

§ 1223. **Proof must connect license fee with patent.**—Ordinarily, after the expiration of a license for a patented machine, where the licensee continues the use without right, the best evidence of the value of the use would be the license fee already established ; but if the patented machine embodies other patented devices than the one sued on, it must be shown what portion of the license fee was paid for the part covered by the particu-

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([a]) Sargent *v.* Yale Lock Mfg. Co., 17 O. G. 106; Wooster *v.* Simonson, 20 F. R. 316; Cottier *v.* Stimson, Ib. 906; Hammacher *v.* Wilson, 32 F. R. 796; Cary *v.* Lovell Mfg. Co., 37 F. R. 654; McDonald *v.* Whitney, 39 F. R. 466; Timken *v.* Olin, 41 F. R. 169.

([b]) Westcott *v.* Rude, 19 Fed. R. 830; Rude *v.* Westcott, 130 U. S. 152, 165; Cornely *v.* Marckwald, 23 Blatch. 163; on app., 131 U. S. 159; Greenleaf *v.* Yale Lock Mfg. Co., 17 Blatch. 253; Black *v.* Munson, 14 Blatchf. 265; United Nickel Co. *v.* Central P. R. Co., 36 F. R. 186; Keyes *v.* Pueblo S. & R. Co., 43 F. R. 478.

([c]) Graham *v.* Geneva Lake C. Mfg. Co., 24 Fed. Rep. 642.

lar patent in controversy.([a]) When the proof shows a license based on two patents, one of which had been declared void, and there was no clear evidence of the value of the other, it was held that only nominal damages could be recovered.([b])

§ 1224. **License fee where different rights are involved.**—The value of some patents consisting chiefly in the right to use, of others in the right to sell, royalties paid by licensees for the right to use is not evidence of damages sustained by the patentee through the sale of the patented article, sufficient to authorize a recovery. In a case of this sort,([c]) where both rights were valuable, the complainant had made agreements granting, on payment of a royalty, the exclusive right to manufacture and sell, with covenants not to sue purchasers buying for certain specified uses. As to these agreements the court said that a royalty paid for the whole monopoly is not sufficient evidence of the value of the right to make occasional sales in a particular territory, and that aside from this, the covenant not to sue purchasers operating by way of estoppel, as a license to the purchaser to use, the royalty was paid for the double right and was no criterion of the value of the ordinary selling right. And where the patentee grants an exclusive license, it is only the licensee who can establish a royalty.([d])

§ 1225. **License fees in equity.**—Although it has been often said that a license fee is the natural measure of damages at law, and profits the measure of recovery in equity, this must not be taken to be an invariable rule. The effort of the law in either case is to compensate the

([a]) Porter Needle Co. *v.* National Needle Co., 22 Fed. R. 829.
([b]) Moffit *v.* Cavanagh, 27 F. R. 511.
([c]) Colgate *v.* Western Electric Mfg. Co., 28 F. R. 146.
([d]) Bell *v.* U. S. Stamping Co., 32 Fed. R. 549.

plaintiff for what he has lost through the infringement. In Burdell *v.* Denig ([a]) the Supreme Court said: "No doubt in the absence of satisfactory evidence of either class in the forum to which it is most appropriate, the other may be resorted to as one of the elements on which the damages or the compensation may be ascertained." And this was followed in Emigh *v.* Baltimore & Ohio R.R. Co.,([b]) an equity suit, in which proof of profits being extremely difficult if not impossible, the court, in the case of a patented car-brake, accepted an established license fee as a proper basis.

§ 1226. **Where no license fee is established.**—The last class of cases is where no license fee has been established. As far as the value of the use is concerned, the rule of damage is well shown in Suffolk Co. *v.* Hayden.([c]) In this case the plaintiff's patent consisted of an improvement in a cotton-cleaning machine. No sales had been made of the machine, and evidence was introduced to show the advantage of the new over the old method. This was held to be correct, the court saying:

"There being no established patent or license fee in the case, in order to get at a fair measure of damages, or even an approximation to it, general evidence must necessarily be resorted to. And what evidence could be more appropriate and pertinent than that of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringer, a jury will be in possession of material and controlling facts that may enable them, in the exercise of a sound judg-

([a]) 92 U. S. 720.

([b]) 4 Hughes 271.

([c]) 3 Wall. 315, 320; *cf.* Brodie *v.* Ophir Silver Mining Co., 4 Fish. P. C. 137; Conover *v.* Rapp, Ibid. 57; Campbell *v.* Barclay, 5 Biss. 179; Bell *v.* Daniels, 1 Fish. P. C. 372; Page *v.* Ferry, 1 Fish. P. C. 298; Serrell *v.* Collins, 1 Fish. P. C. 289; Case *v.* Brown, 2 Fish. P. C. 268.

ment, to ascertain the damages, or, in other words, the loss to the patentee or owner, by the piracy, instead of the purchase of the use of the invention."

It was held that damages could only be given for the period of the infringement, as the recovery gave no right to continue the use.

§ 1227. **Damages must not be conjectural.**—In a suit for profits and damages for making, using, and selling an improvement in time-detectors for watches, the master reported a certain sum as profits from sales, and beyond this as damages a sum certain on each time-detector sold, arrived at by taking the usual profits made by *plaintiff*. The first item was allowed, but not the second, it not being made to appear that the plaintiff would have made sales to the persons who purchased from the defendants, and also because the estimated profit of the patentee embraced not only that derived from the patent, but from the whole article. "When the inventor charges a royalty or license fee, he isolates the value of the use of his invention, and, separating it from all other things, fixes its value as against himself and in favor of others."[a]

§ 1228. **Profits at law.**—In many cases, as in those where the patentee exercises his right as a close monopoly, or where he manufactures and sells the patented article, an infringement may occasion damages to his business by loss of profits. These can generally be recovered, if susceptible of proof. But the decisions are not uniform as to the mode of estimating these profits. In many cases it is said that the amount of profits the defendant has made will measure the damages, on the presumption that the plaintiff would have made these but for the infringe-

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[a] Buerk *v.* Imhaeuser, 14 Blatchf. 19, 22.

ment.[a] But in Seymour *v.* McCormick [b] the court said:

"It is only where, from the peculiar circumstances of the case, no other rule can be found, that the defendant's profits become the criterion of the plaintiff's loss. Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact. . . . . The question is not what speculatively he may have lost, but what actually he did lose."

In Burdell *v.* Denig [c] there was some evidence to show that there had been an offer to sell licenses, and that one or two had been sold, but the plaintiffs had afterwards refused to license, and had said that they desired to keep the use of the machine as a close monopoly. There was also evidence as to profits made by the defendants. The plaintiffs asked the court to charge, that "this testimony was not sufficient to change the rule of damages from the profits which plaintiffs would have made, if they had not been embarrassed by the interference of the defendants, to a mere license price." The court said:

"There are two sufficient objections to this prayer: *First.* In cases where profits are the proper measure, it is the profits which the *infringer* makes, or ought to make, which govern, and not the profits which *plaintiff* can show that *he* might have made. *Second.* Profits are not the primary or true criterion of damages for infringement in an action at law. That rule applies eminently and mainly to cases in equity, and is based upon the idea that the infringer shall be converted into a trustee, as to those profits, for the owner of the patent which he infringes. . . . . On the other hand, we have repeatedly held that sales of licenses of machines, or of a royalty established, constitute the primary

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[a] Wilbur *v.* Beecher, 2 Blatchf. 132; Hall *v.* Wiles, Ibid. 197; Pitts *v.* Hall, Ibid. 229; Wayne *v.* Holmes, 2 Fish. P. C. 20.

[b] 16 How. 480, 490.

[c] 92 U. S. 716, 719.

and true criterion of damages in the action at law. No doubt, in the absence of satisfactory evidence of either class in the forum to which it is most appropriate, the other may be resorted to as one of the elements on which the damages or the compensation may be ascertained; but it cannot be admitted, as the prayer which was refused implies, that in an action at law, the profits which the other party might have made is the primary or controlling measure of damages."

With all deference to the tribunal delivering this opinion, it seems inconsistent with the principles on which damages are given, that they should ever be *measured* by the profit which the defendants have made. These profits may be evidence tending to show what the plaintiff has lost, but unless it can be shown that these would have been made by the plaintiff, it is difficult to understand how the plaintiff, in an action at law, can ever recover them. It is possible that the learned court only intended to say, that where the plaintiff seeks to recover profits distinctly as such, and not as incidental to damages for injury to business, he should sue in equity, where he recovers the profits made by the defendant and not those he might have made himself, but the language seems to go further than this. In Cowing *v.* Rumsey ([a]) the plaintiff had patented a machine for polishing cylinders, and exercised his rights as a close monopoly. The defendant had made and used one. At the trial the jury were told to give the profits which the defendants had made and not those which the plaintiff had lost. On motion for a new trial before Woodruff, J., this was held to be error. The learned judge said, that, in equity, the plaintiff could recover the defendants' profits, but in law he could only recover his own damage; that it was proper to prove the defendants' profits and the sales made, as an

([a]) 4 Fish. 275.

element of consideration to show the plaintiff's loss; in some cases this is the only mode of showing this loss, but there is no conclusive presumption that they are the same. So, in Whitney *v.* Emmett,(a) it was said, on a motion for a new trial, that the plaintiff's profit might be *estimated* from that of the defendant, but the latter was not the measure of the former. In the earlier cases, the rule allowing only nominal damages, where the plaintiff is not shown to have sustained any loss, seems to have been a good deal relaxed. The tendency of the later decisions, as we shall presently see, is in the other direction. It is by no means impossible that the defendant may have made large profits, which the plaintiff would have been unable to make, even if there had been no infringement. The true rule seems to have been laid down in Goodyear *v.* Bishop,(b) where the jury were told that they must consider whether the plaintiffs would have sold these goods, if the defendants had not, and whether the plaintiffs were deprived of their profits by the acts of the defendants; that they must consider how many customers were diverted from the plaintiffs, and whether the plaintiffs were prepared to supply the full demand; in short, whether the plaintiffs were limited and hindered to that amount. In Carter *v.* Baker (c) it was held, that in estimating the profits made by the defendants, only profits arising from the plaintiffs' machine as patented could be considered, and none from improvements on it made by defendants. It was also held, that if the plaintiffs had been obliged to carry over machines, because unable, through the defendants' inter-

(a) Bald. 303; *cf.* Many *v.* Sizer, 1 Fish. 17; McComb *v.* Brodie, 5 Fish. 384; Covert *v.* Sargent, 38 F. R. 237.

(b) 2 Fish. 154.

(c) 4 Fish. 404; 1 Sawy. 512.

ference, to sell so many, they could recover the value of the use of the capital invested. In Wayne *v.* Holmes ([a]) it was held, that where the specification referred to a machine for making the plaintiff's article, profits made by use of improved machines may be considered. In Hogg *v.* Emerson ([b]) it was held to be good ground for mitigation of damages, where the defendants had acted without knowledge of the plaintiff's patent, and under orders from a customer.

§ 1229. **Treble damages.**—By section 4919 of the Revised Statutes, power is given to the court to enter judgment for three times the actual damages found by the jury. The exercise of this power is in the discretion of the court.([c]) The object of the provision is to prevent wanton violation of the patentee's rights.([d]) In Guyon *v.* Serrell ([e]) the plaintiff had not filed a disclaimer of the invalid part of his patent till after the suit was begun. Nelson, J., held, that the damages should not be increased, as the defendant might have been misled by the specification. "Cases may arise, where the circumstances are aggravated, and such as to repel altogether the *bona fides* of the infringement, in which the power to increase the verdict should be exercised. Each case must depend upon its own circumstances."([f]) This power takes the place of the power of the jury to allow exemplary damages in other actions for torts, as it is well settled

([a]) 2 Fish. 20.

([b]) 11 How. 587.

([c]) Stimpson *v.* Railroads, 1 Wall. Jr. 164.

([d]) Brodie *v.* Ophir Silver Mining Co., 4 Fish. 137; Schwarzel *v.* Holenshade, 3 Fish. 116; 2 Bond 29; Lyon *v.* Donaldson, 34 F. R. 789; Welling *v.* La Bau, 35 F. R. 302.

([e]) 1 Blatch. 244.

([f]) Ibid.

that no exemplary damages can be given by the jury in actions on patents.([a])

§ 1230. **Profits in equity.**—In equity, the plaintiff recovers the profits made by the defendant, as upon an accounting by a trustee.([b]) All items of cost must be deducted from the gross receipts.([c]) It is not, however, proper to make an allowance for compensation for the time and labor of the infringer.([d]) In Mowry *v.* Whitney,([e]) the plaintiff's patent consisted in an improved method of annealing car wheels. The master's report showed that defendant had built up his business by making wheels on the old plan; that during the time he infringed the plaintiff's patent he employed both means of annealing; that on the introduction of the new method there was no falling off in the demand for the old wheels, but both sold at the same price. He also found that without annealing by some process, the wheels were only worth the price of old iron. He allowed the difference between this and the price of the wheel. It appeared that the plaintiff had stated in an affidavit that by his process wheels could be made equally strong with the use of less material, and claimed this as the advantage of his method. The court held that if this statement was correct, the plaintiff's profits were only the value of the iron saved, and that it was not an unfair presumption that the defendant's profits were the same. The court then said:

([a]) Ransom *v.* Mayor of New York, 1 Fish. P. C. 252; Wilbur *v.* Beecher, 2 Blatchf. 132; Hall *v.* Wiles, 2 Blatchf. 197.

([b]) Burdell *v.* Denig, 92 U. S. 719.

([c]) Troy I. & N. Factory *v.* Corning, 3 Fish. 497.

([d]) Piper *v.* Brown, 1 Holmes 196; Williams *v.* Leonard, 9 Blatchf. 476; *cf.* Rubber Co. *v.* Goodyear, 9 Wall. 788.

([e]) 14 Wall. 620; *cf.* Jones *v.* Morehead, 1 Wall. 155; Seymour *v.* McCormick, 16 How. 480; Schillinger *v.* Gunther, 14 O. G. 713.

"Now it is clear that Whitney is not entitled to receive more than the profits actually made in consequence of the use of his process in the manufacture of the 19,819 wheels. It is the additional advantage the defendant derived from the process—advantage beyond what he had without it—for which he must account. . . . . It is as true of a process invented as an improvement in a manufacture, as it is of an improvement in a machine, that an infringer is not liable to the extent of his entire profits in the manufacture. . . . . The same principle, therefore, which gives to the complainants the aggregate profits of the entire manufacture would give the same profits to a patentee of the process of chilling, if there were one; and as there are many processes in the manufacture, ... and as every one of the processes is necessary to make a marketable wheel, an infringer might be mulcted in several times the profits he had made from the whole manufacture. We cannot assent to such a rule. The question to be determined in this case is, *what advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public, and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits.*"[a]

So, in Mason *v.* Graham,[b] it was held that where the defendant made an invention by which he saved fifty cents a pair on the cost of the articles according to the plaintiff's patent, he need not account for this saving, as the plaintiff could only recover the benefits which the defendant derived from the former's patent. In the Cawood Patent,[c] the defendant infringed a patent for a machine for repairing rails. It was held that he could not show that repairing rails was not true economy, but that the complainant could recover what the defendant saved through using the complainant's machine instead of other machines. "If their

[a] Mowry *v.* Whitney, 14 Wall. 620, 649–651.

[b] 23 Wall. 261.

[c] 4 Otto 695; *cf.* Tilghman *v.* Mitchell, 9 Blatch. 1; Household Co. *v.* Neilson, 1 Webst. P. C. 697; Mevs *v.* Conover, 11 O. G. 1111; Thomson *v.* Wooster, 114 U. S. 104.

general business was unprofitable, it was the less so in consequence of their use of the plaintiff's property."[a] In Elizabeth *v.* Pavement Co.,[b] the city had laid the plaintiff's patented pavement in some of its streets. The bill was filed against the city and the contractor who laid the pavement. The Supreme Court said :

"If an infringer of a patent has realized no profit from the use of the invention, he cannot be called upon to respond for profits. . . . . A patentee is entitled to recover the profits that have been actually realized from the use of his invention, although, from other causes, the general business of the defendant, in which the invention is employed, may not have resulted in profits. . . . . On the contrary, though the defendant's general business be ever so profitable, if the use of the invention has not contributed to the profits, none can be recovered. . . . . It may be added, that where no profits are shown to have accrued, a court of equity cannot give a decree for profits, by way of damages, or as a punishment for the infringement. . . . . The defendant will not be allowed to diminish the show of profits by putting in unconscionable claims for personal services."[c]

The court, after stating that these propositions were well established, held, that as the city was shown to have paid the same price to the infringers as was paid to the owners of the patent, it had made no profit, and the accounting could only be against the builders of the road. In Tremaine *v.* Hitchcock[d] (The Tremolo Patent) the plaintiff's invention was a tremolo attachment to an organ. The defendants were organ manufacturers. It was held that the master properly set off a proportional part of the expenses of the business, against the profits made by this attachment. In Troy Iron & Nail Factory *v.* Corning[e] it was held that where the defendants

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[a] The Cawood Patent, 94 U. S. 695, 710.
[b] 97 U. S. 126.
[c] Elizabeth *v.* Pavement Co., 97 U. S. 126, 138–139.
[d] 23 Wall. 518. [e] 3 Fish. 497.

were manufacturers of the material from which the patented articles were made, small sales of the material to outsiders were not conclusive as to its cost, where by far the larger quantity was turned into their own factory. In Sanders *v.* Logan ([a]) and Livingston *v.* Jones ([b]) it was held that where the inventor's profit consists in a license fee, this is the measure of damages, and a bill for an accounting will not lie, as there is a complete remedy at law. That the only cases where profits can be recovered are where the inventor finds his profit in the exclusive manufacture and sale of some new machines, or of some new form of an old machine, which, as a distinct species, is more valuable or can be put into the market cheaper, so as to exclude other machines. By the act of 1870, adopted into the Revised Statutes, section 4921, damages as well as profits may be given in equity. Under this act it was held, in Marsh *v.* Seymour,([c]) that "damages of a compensatory character may be allowed to a complainant in an equity suit, where it appears that the business of the infringer was so improvidently conducted that it did not yield any substantial profits." In Birdsall *v.* Coolidge ([d]) the court said: "Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent; in which event the provision is, that the complainant 'shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby.'" In Mason *v.* Graham,([e]) where it appeared that the arti-

([a]) 2 Fish. 168.
([b]) Ib., 207; *cf.* Sayles *v.* Richmond, F. & P. R.R. Co., 16 O. G. 43.
([c]) 97 U. S. 348.
([d]) 93 U. S. 64, 69.
([e]) 23 Wall. 261.

cle had been sold for a certain price when separated from the machine to which it formed an attachment, it was held that this formed a better estimate of profits than by taking a part of the profits bearing the same ratio to the whole profits as the cost of the attachment bore to the whole machine.

§ 1231. **Present rule in equity.**—The whole subject has been fully considered by the Supreme Court in several recent cases. In an equity suit praying for an injunction, profits, and damages, it appeared that the patent was for a process of manufacturing fat acids and glycerine from fatty bodies, by the action of water at a high temperature and pressure. The defendants contended that the plaintiff, having established license fees, was not entitled to any gains or profits accruing to the defendants in excess of those fees. The plaintiff contended that, as the profits exceeded the damages, he had the right to waive the damages found by the master, and have a decree for the profits. The court reviewed the cases, and showed that the rule allowing profits had its origin, not in the statutes, but in the general doctrines of equity. These principles, it said, regard the profits made by the infringer as belonging to the patentee. It is inconsistent with them either, on the one hand, to permit the wrong-doer to profit by his own wrong; or, on the other hand, to make no allowance for the costs and expenses of conducting his business, or to undertake to punish him by compelling him to pay more than a fair compensation to the person wronged. It follows from this that the infringer is liable for actual gains, not for what he might have made, or, in other words, "the fruits of the advantage which he derived from the use" of the plaintiff's invention, "over what he would have had in using other means then open to the public, and adequate

to enable him to obtain an equally beneficial result," and this advantage is the measure of the profits to be accounted for, even if, from other causes, the business did not result in profits, for anything *saved* is regarded as a profit. And on these principles the profits were computed.([a]) This rule means that we must compare the device with what was known and open to the public *at and before* the date of the patent. When a subsequent patent is introduced, which is as effective and no more expensive than the first, the infringer cannot avoid the operation of the rule by obtaining a license to use the second patent, and then continuing to use the first. If such were the meaning of the rule, the claim of the prior patentee for profits realized from the actual use of his invention might be defeated by showing that the infringer was at liberty to use, though he did not use, the subsequent invention.([b])

§ 1232. **Origin of rule in equity.**—The general rule in equity suits has been frequently based on the theory that the infringer is converted into a trustee for the owner of the patent; but it has been declared by the Supreme Court, upon an elaborate review of the authorities in this country and in England, that it is more strictly accu-

([a]) Tilghman *v.* Proctor, 125 U. S. 136; *acc.* Mowry *v.* Whitney, 14 Wall. 620; The Cawood Patent, 94 U. S. 710; Mevs *v.* Conover, 11 O. G. 1111; 125 U. S. 144, *in notis;* Elizabeth *v.* Pavement Co., 97 U. S. 138; Root *v.* Railway Co., 105 U. S. 202; Thomson *v.* Wooster, 114 U. S. 104; Knox *v.* Great Western Q. M. Co., 6 Sawy. 430; Ingels *v.* Mast, 1 Flip. 424; Putman *v.* Lomax, 10 Biss. 546; Fischer *v.* Hayes, 22 Fed. R. 529; Reed *v.* Lawrence, 29 F. R. 915; Same *v.* Chase, Ib.; Bell *v.* U. S. Stamping Co., 32 F. R. 549; McMurray *v.* Emerson, 36 F. R. 901; Coupe *v.* Weatherhead, 37 F. R. 16; Webster L. Co. *v.* Higgins, 39 F. R. 462; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 40 F. R. 476.

([b]) Turrill *v.* Illinois C. R.R. Co.; Same *v.* Michigan S. & N. I. R.R. Co., 20 Fed. R. 912; *aff'd* Illinois Cent. R.R. Co. *v.* Turrill; Michigan So. &. N. I. R.R. Co. *v.* Same, 110 U. S. 301; *cf.* National C. B. S. Co. *v.* Terre Haute C. & Mfg. Co., 19 Fed. Rep. 514.

rate to say that a court of equity, which has acquired *upon some equitable ground* jurisdiction of a suit for the infringement of a patent, will not send the plaintiff to a court of law to recover damages, but will itself administer full relief by awarding, as an equivalent or substitute for legal damages, a compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property to his own advantage.([a])

The practical importance of these decisions is very great. Under them, a bill in equity for a naked account of profits and damages will not lie. The relief is ordinarily incidental to some other equity, which gives the patentee his standing in court; an injunction against continuance of the infringement being the most common case. But it is expressly laid down that other grounds may arise, as where the title is equitable merely, or there are impediments to remedies purely legal; and it may be even that the equity will arise out of the nature of the account itself, springing from circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate, and incomplete, but any such case must rest upon its own special circumstances. Hence ordinarily, when the patent has expired, and the right to an injunction with it, there can be no accounting in equity.([b])

([a]) Root *v.* Railway Co., 105 U. S. 189, 214, 215; Tilghman *v.* Proctor, 125 U. S. 136, 148.

([b]) Root *v.* Railway Company, 105 U. S. 189, 215. This seems to overrule Gordon *v.* Anthony, 16 Blatch. 234, which held, on a review of the cases, that although the suit in equity is brought after the expiration of the patent, and the bill is not for discovery, the court has jurisdiction to direct an account of profits. Under the latest decisions of the Supreme Court, it would seem to be absolutely incumbent upon a plaintiff to make a standing in court for himself by showing some equity. Under the old view, the assumed trust relation was quite enough; but there being no trust relation, some other species of equity must be established.

§ 1233. **Plaintiff must separate profits—Nominal damages.**—It is a universal rule that a person injured in property rights must prove some substantial loss; otherwise he will be entitled only to nominal damages. Thus, where the patent was for an improvement in the method of moving and securing in place the movable jaw or clamp of a mop-head, the plaintiff in an equity suit proved the cost of his mop-heads and the price for which they were sold, and claimed the right to recover the difference. The court below held that the patentee must in every case give evidence tending to separate and apportion profits and damages between the patented and unpatented features, by means of reliable and tangible, not speculative or conjectural proof; or he must show by equally good evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.([a]) And on appeal this was held correct by the Supreme Court.([b])

In Black *v.* Thorne,([c]) an equity suit, plaintiffs were allowed substantial damages for infringement of improvements for burning wet fuel, the master reporting that they were entitled to recover as profits the cost or value of the wood, which, but for the use of the patented inventions, they would have burned in generating heat for their tanneries. The rule was held erroneous, and the case was sent back to the master, and further testimony taken, upon which he reported that there was no

([a]) Garretson *v.* Clark, 15 Blatch. 70.

([b]) Garretson *v.* Clark, 111 U. S. 120; *acc.* Schillinger *v.* Gunther (pavement patent), 15 Blatch. 303; Kirby *v.* Armstrong, 10 Biss. 135; Calkins *v.* Bertrand, Ib. 445; Tuttle *v.* Gaylord, 28 F. R. 97; Tuttle *v.* Loomis, Ib.; Roemer *v.* Simon, 31 F. R. 41; Everest *v.* Buffalo L. O. Co., 31 F. R. 742.

([c]) 12 Blatch. 20.

proof before him showing what profits, if any, had been made. This report was confirmed, and on appeal the decree entered upon it affirmed by the Supreme Court. Mr. Justice Field, in delivering the opinion of the court, said :

"It does not always follow, that because a party may have made an improvement in a machine and obtained a patent for it, another using the improvement and infringing upon the patentee's rights will be mulcted in more than nominal damages for the infringement. If other methods in common use produce the same results, with equal facility and cost, the use of the patented invention cannot add to the gains of the infringer, or impair the just rewards of the inventor. The inventor may indeed prohibit the use, or exact a license fee for it, and if such license fee has been generally paid, its amount may be taken as the criterion of damage to him when his rights are infringed. In the absence of such criterion, the damages must necessarily be nominal." (a)

In this case the master's second report showed that there were methods other than those of the plaintiffs' which would produce the same results, and to which defendants were entitled to resort, and that the saving to them or profits made by them, by the use of plaintiff's inventions, over the other furnaces, was not proved. "Such being the case, the report could not have been otherwise than as it was." (b)

§ 1234. **Entire profits not recoverable.**—In Dobson *v.* Hartford Carpet Company,(c) the general principles involved in such suits were applied to an infringement for a design in carpets.(d) The suit was in equity to recover damages and profits. The court said that the rule could

(a) Black *v.* Thorne, 111 U. S. 122, 124.

(b) Ib., p. 124.

(c) 114 U. S. 439; Same *v.* Bigelow Carpet Co., Ib.

(d) By U. S. R. S., § 4933, the protection to patents is extended to designs.

not be the entire profits from the manufacture and sale of the carpet, regarding these as due to the pattern or figure, unless this was established by reliable proof; that it was a matter of common knowledge that there is an infinite variety of patterns in carpets, and that between two carpets equal in other respects, one having a patented and the other an unpatented design, the former may or may not command the higher price. "If it does, then the increased price may be fairly attributed to the design; and there is a solid basis of evidence for profits or damages. But, short of this, under the rules established by this court, there is no such basis. The same principle is applicable as in patents for inventions. The burden is upon the plaintiff."[a] The court also suggested that as various infringing processes might be used in making the carpet, if the entire profit is to be attributed to the pattern, so might it also be attributed as well to each of the other infringements, and a defendant might be called on to respond many times over for the same amount. The rule in question is even more applicable to a patent for a design than to one for mechanism, because design is often a matter of fancy or caprice or fashion, and the article must have intrinsic merits of quality or structure to obtain a purchaser. Hence, to attribute in law the entire profit to the pattern, to the exclusion of the other merits, and in the absence of evidence, not only violates the statutory rules of "actual damages" and of "profits to be accounted for," but confounds all distinctions between cause and effect. And the plaintiff was allowed only nominal damages.[b]

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[a] Dobson *v.* Hartford Carpet Co., 114 U. S. 439, 444.

[b] The cases followed were Livingston *v.* Woodworth, 15 How. 546; Seymour *v.* McCormick, 16 How. 480; Mayor of New York *v.* Ransom, 23 How. 487; Mowry *v.* Whitney, 14 Wall. 620; Philp *v.* Nock, 17 Wall. 460;

The decision in Dobson *v.* Hartford Carpet Co.([a]) was followed in Dobson *v.* Dornan,([b]) another case of a patented design for carpets. The master found that the plaintiff's profits on their carpets were a certain percentage, and assumed or presumed that the defendant's carpets, which were far inferior in quality as well as in market value, displaced those of the plaintiff's to the extent of the sales, and held the proper measure of damages to be the entire profit which the plaintiff would have received, at such percentage, from the sale of an equal quantity of their own carpets of the same pattern. The defendants, even at their low prices, made no profits. Under these circumstances the Supreme Court said that there could be no presumption that the plaintiffs would have sold their better carpets in place of the poorer quality if the latter had not existed, or that the pattern would have induced the purchasers from the defendants to give to the plaintiffs the higher price. On the contrary, the court considered the presumption to be that the cheaper price, not the pattern, sold the defendants' carpets. There was no satisfactory proof that those who bought the cheap carpets would have bought the higher-priced ones, or that the design added anything to the defendants' price, or promoted their sale of the particular carpet, and none to show what part of the defendants' price was to be attributed to the design. In arriving at the percentage of profit made by the plaintiffs on their sales, the cost was made up by computing all the items which entered into the production of their carpets; but the court said that this did not

Littlefield *v.* Perry, 21 Wall. 205; Birdsall *v.* Coolidge, 93 U. S. 64; Cawood Patent, 94 U. S. 695; Blake *v.* Robertson, 94 U. S. 728; Garretson *v.* Clark, 111 U. S. 120; Black *v.* Thorne, Ib. 122.

([a]) *Ubi supra.*

([b]) 118 U. S. 10.

overcome the difficulty, as the objection was to making the whole profit the measure of damages rest on two assumptions — 1st, that the whole of it was due to the design; 2d, that the plaintiffs would have sold of their better carpets a quantity equal to the cheaper carpets sold by the defendants. In this case it was urged that the principle of computing damages in respect to a patent for a machine, or an improvement in such a patent, or a process, was not applicable to a patent for a design, because in the former case the result is patented; in the latter, the means; that in the design patent there is no other way of effecting the result, while in the other there is; and that therefore in the design patent the entire profits or damages are to be given. But the court thought all this covered by their previous decision in Dobson *v.* Hartford Carpet Co.[a]

§ 1235. **Patents for designs.**—Where patents are given for designs, it must often, as appears from the cases already cited, be a matter of the greatest difficulty to arrive at any fair measure of compensation. A recent statute gives an arbitrary measure of recovery of $250 in any case.[b] In Simpson *v.* Davis [c] the patent was for a design for newel-posts, and the court held that the remainder of the price realized from the sale of newels of the plaintiff's design, after deducting the cost of making the newels, and ten per cent., which the testimony showed to be a fair manufacturer's profit, must be presumed to represent the profit realized by the defendant from his use of plaintiff's design; and that this presumption was not dispelled by proving that the defendant realized the same profit from adopting in the manufacture

[a] 114 U. S. 439.
[b] See Pirkl *v.* Smith, 42 F. R. 410.
[c] 22 Blatch. 113.

of the newels sold by him a different and unpatented design. "The fact that a certain profit is realized from the adoption of the design of A, does not show that no profit is realized from the adoption of the design of B." (a) In Tomkinson *v.* Willets Mfg. Co.(b) the patent was for a design for a vegetable dish. The plaintiff was held entitled to recover all the profit fairly attributable to his design; but this was not the difference between the profit secured by selling the infringing square dishes instead of oval ones.

"The amount of that profit must be itself subdivided into the sums due respectively to the adoption of a square-shaped dish generally, and to the appropriation of plaintiff's particular variety of square-shaped dish. To the latter sum he is entitled, but its amount is certainly not ascertained by comparing the sales and cost of the infringing dishes with the sales and cost of the oval dishes. *Non constat* but that defendant would have secured 90 per cent. of its 'extra profits,' as complainant calls them, by sales of such square dishes as it was free to use. If so, the plaintiff would be entitled only to the remaining 10 per cent. as profits resulting from pirating his peculiar square dish. It may be that complainant may find it difficult, if not impossible, to prove the amount of such profit, but that is a difficulty inherent in the particular kind of patent which he holds. One who by some lucky chance secures a patent for 'the mere shadow of a shade of an idea,' should not be disappointed if the grant, even though uncontested, subsequently proves of no appreciable pecuniary value." (c)

In most cases the right to an injunction and the opportunity of fixing a license fee will be the only protection upon which the patentee of a design can rely. The difficulty of proving the profits made by the defendant would not seem to involve the conclusion that designs

(a) Simpson *v.* Davis, 22 Blatchf. 113, 114.
(b) 34 F. R. 536.
(c) Tomkinson *v.* Willets Mfg. Co., 34 Fed. R. 536, 537.

have no pecuniary value. Indeed, we know the contrary to be the fact. Nor does the criticism of the learned court, that a design is "the mere shadow of a shade of an idea," seem just. Superiority, originality, and elegance of design is a matter of as great commercial importance in many cases as novelty of invention in others. Both are intangible and incorporeal, and so far as the relative amount of intellect required is concerned, it is probably no more just to call a design for carpets the shadow of the shade of an idea than to apply the same epithet to a new device for a lock.

§ 1236. **Criticism of the rule in equity.**—In Herring *v.* Gage,[a] a case of infringement of an improvement for cooling and drying meal, the rule so often laid down, that the question to be determined is, what advantage did the defendant derive from using the complainant's invention, over what he had in using other processes open to the public, and adequate to enable him to obtain an equally beneficial result,[b] was examined by Wallace, J. He said that the real inquiry was, what is the advantage derived by the infringer from the use of his invention?

"Here, the defendants saved a considerable quantity of flour by the use of the complainants' property, which, until they used it, had been lost. Their gain is directly traceable to the use of the invention. How is it important to ascertain what they might have saved, if, instead of using the complainants' property, they had used some other device? How are they in a better position than they would be if there had been a different device which was patented, and they had acquired the right to use it from the patentee, but, instead of using it, saw fit to employ the complainants' device? Mowry *v.* Whitney was a case where the entire profit of the manufacture of an article made by

(a) 15 Blatch. 124.
(b) Mowry *v.* Whitney, 14 Wall. 620.

the patented process was given upon an accounting, when that profit was largely due not to the advantage derived from the patented process but from that of other processes actually used by the manufacturer, and which he had the right to use; and what was said in that case, pertinent to such a state of facts, is not to be assumed as the enunciation of the rule where the profit has been made directly by the use of the patentee's device. Such a rule would impose an extraordinary burden upon a patentee, because it would require him, when seeking for redress, to explore the whole realm of practical and theoretical mechanism, to ascertain and demonstrate that what was realized by the wrongful appropriation of his invention could not have been made by the use of any other device or substitute which the infringer might have employed. The infringer is, at the election of the patentee, treated as a trustee, and, as such, required to account for the profits actually made by the use of the patentee's property. It would be a novel defense to permit a trustee who has made a profit by the use of the money or property of his *cestui que trust*, to show that he would have made an equal profit if he had used the money or property of a third person, or if he had used his own money or property. It was quite unnecessary, in my judgment, to enter into any investigation of the savings which the defendants might have realized if they had used some other than the complainant's device."[a]

In Burdett *v.* Estey[b] the ordinary rule that a complainant must point out the fruits of the advantage which the infringer derived from the use of the plaintiff's invention over what he would have had in using other means then open to the public, and adequate to enable him to obtain an equally beneficial result, seems not to have been followed. The patent was for an additional partial inclined set of reeds for use in organs, described as being so tuned as to produce a wavy tone. The wave tuning was free, but constituted an important factor in the profits. It cost nothing but the labor and skill of the

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[a] Herring *v.* Gage, 15 Blatchf. 124, 128.

[b] 19 Blatch. 1.

tuner, and for this an allowance was made. It appeared, also, that the defendant might have used a horizontal partial set to nearly or quite the same advantage. Nevertheless, he was charged with the whole profits on the partial sets. But the rule in general seems now to be too well established to be shaken.

§ 1237. Entire profits somemties recoverable.—In the case of a patent for an improvement in gas pumps for oil-wells, it appeared that a limited locality required a particular kind of pump, to be used only in that locality for a special purpose. The market was also limited in demand, so that a single manufacturer could supply it. There was no other pump that could successfully compete with that controlled by the patent. Under these exceptional circumstances, the Supreme Court held the patentee entitled to recover the difference between the cost of the material and labor used by the infringer in making the pumps which he sold, and the price received for them.([a]) The court said that the rule applicable to this class of cases was well stated by Mr. Justice Story in Mowry *v.* Whitney,([b]) *i. e.*, What advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public, and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits. Notwithstanding this, the court said, it did not necessarily follow that because the patent is for one of the constituent parts of a machine, the profits are simply those derived from the manufacture and sale of *the patented part separately.*

"If without the improvement, a machine adapted to the same

([a]) Manufacturing Co. *v.* Cowing, 105 U. S. 253.
([b]) 14 Wall. 620.

uses can be made which will be valuable in the market, and salable, then, as was further said in that case, the inquiry is 'What was the advantage in cost, in skill required, in convenience of operation, or marketability,' gained by the use of the patented improvement? If the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, then it is clear the infringer has by his infringement secured the advantage of a market he would not otherwise have had, and that the fruits of this advantage are the entire profits he has made in that market. Such, we think, is this case." [a]

It follows from the foregoing that, as a general rule, it is right to give the plaintiff the entire profits made by defendant only where the defendant's machine, or process, or patented article derives its entire value from the infringement, and that but for this it would not have been used at all.[b] But in all other cases, the plaintiff must show the particular profits which accrued from the patent.[c]

§ 1238. **Method of estimating profits when recovery is not entire.**—The plaintiff was the patentee of an improvement in trunks, which consisted in covering the frame of the trunk with narrow strips of wood. The defendant infringed by manufacturing and selling. As the plaintiff was only entitled to the profits attributable to the patented device, the court held that a proper method of estimating damages would be to take the profits made

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[a] Manufacturing Co. *v.* Cowing, 105 U. S. 253, 255.

[b] Williams *v.* Rome, W. & O. R.R. Co., 18 Blatch. 181; Elizabeth *v.* Nicholson Pavement Co., 97 U. S. 126, 139; Root *v.* Railway Co., 105 U. S. 189, 203; Garretson *v.* Clark, 111 U. S. 120; Hurlbut *v.* Schillinger, 130 U. S. 456; Fifield *v.* Whittemore, 33 F. R. 835; Welling *v.* La Bau, 34 F. R. 40.

[c] Mowry *v.* Whitney, 14 Wall. 651; Black *v.* Munson, 14 Bltachf. 265; Magic Ruffle Co. *v.* Elm City Co., 14 Blatchf. 109; Blake *v.* Robertson, 94 U. S. 728; Blake *v.* Greenwood Cemetery, 21 Blatch. 222; Shannon *v.* Bruner, 33 F. R. 871.

by the defendants on one of these trunks, and deduct from them the profits upon an ordinary trunk of similar size and general description. If there were no difference it would indicate that the complainant had suffered no damage legally capable of estimation.(a)

§ 1239. **Defendants' sales not usually criterion.** — As a general thing, when the value of the patent comes from sales, if the defendant sells an infringing article, his sales do not furnish the measure of damages, for it does not follow that if these sales had not been made, similar sales of the patented article would have been made.(b) Thus, in the case of a patented mirror, where the defendants infringed by importing and selling at a loss, the court said that it could not be legitimately inferred that defendants would have sold the same number of mirrors if they had kept up the price; that, on the contrary, the probabilities were that the reduction of price attracted purchasers and increased the number of sales. It was also said that the amount of the annual purchases by the defendants of the complainants in the past might be a fair criterion of their probable purchases in the future, and upon this basis, as the complainants' sales fell off to the extent substantially of the former purchases of the defendants, they were entitled to damages for the loss of profits which would have accrued to them upon sales which they would have made to the defendants. And as a sufficient time had now elapsed to ascertain to what extent the ceasing of defendant's competition increased the subsequent sales of the complainants, this element in

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(a) Maier *v.* Brown, 17 Fed. Rep. 736; *cf.* Fay *v.* Allen, 30 F. R. 446; Vulcanite P. Co. *v.* American A. S. P. Co., 36 F. R. 378.

(b) Seymour *v.* McCormick, 16 How. 480; Maier *v.* Brown, 17 Fed. Rep. 736.

the accounting might be supplied, and the case was sent back to the master to reopen the proofs.(a)

§ 1240. **Sales sometimes measure plaintiff's loss.**—The plaintiff may grant no licenses, while the market may be limited, and he be able to supply the demand by manufacturing himself. In such a case, where the patent was for improvement in locks, adapted only for use by safe-makers, and the infringement consisted of the use of a turning bolt, this bolt being the essential feature of the lock, the master was unable to ascertain what profits the defendant had made. It was proved, however, that the sales of the defendant forced the plaintiff to reduce his price, and it was decided by the Supreme Court that "the difference between his pecuniary condition after the infringement and what his condition would have been if the infringement had not occurred," was to be measured, so far as his own sales of locks were concerned, by "the difference between the money he would have realized from such sales, if the infringement had not interfered with such monopoly, and the money he did realize from such sales." The master reported that the locks contained another patented device, for which infringement a claim was made against the defendant in another suit, and that allowance being made for this and for superior external attractions, for the greater number of combinations, for the shape of the case of the lock, and "for the commercial success of the defendant in effecting sales, where the plaintiff would have failed," the plaintiff was entitled to recover one-half the amount of reduction in price, and this was held to be correct.(b)

(a) Hall *v.* Stern, 20 Fed. Rep. 788.

(b) Yale Lock Mfg. Co. *v.* Sargent, 117 U. S. 536; affirming as to damages decree below, Sargent *v.* Yale Lock Mfg. Co., 17 Blatch. 244, and citing in support of the rule, McComb *v.* Brodie, 1 Woods 153, 161; Philp *v.* Nock, 17 Wall 460, 462; *acc.* Fitch *v.* Bragg, 21 Blatch. 302.

But in such cases as these the plaintiff must show that his reduction in prices was due solely to the acts of the defendants, or to what extent it was due to such acts.[a]

§ 1241. **Profits in excess of damages.**—The profits made by an infringer may amount to more than the license fees would amount to. In such a case it has been held that the plaintiff is entitled to both. The statute gives the plaintiff damages "in addition to the profits."[b] The court said:

"When it comes to the measure of damages, as distinguished from profits, in cases like this, the loss of the license fees might be the limit of the patentee's loss. But they are not, in any such case, the measure or limit of the infringer's gain. . . . . If the question of damages beyond profits was reached, and of any importance, it may be that the stoppage of the use of the patent by the injunction would make an apportionment of the license fees lawful and proper. But, as the profits exceed the damages, in any mode of reckoning the license fees, it is not necessary to consider the question made in that respect."[c]

Under this statute, where the damages exceed the profits, he may have the larger sum assessed.[d]

§ 1242. **Limits of account in equity.**—An accounting for profits in equity after suit to restrain an infringement can only be demanded when the infringement took place previously and continued afterwards.[e]

§ 1243. **Burden of proof in equity.**—In all patent cases, the burden is on the patentee to separate and apportion the defendant's profits and the patentee's damages between the patented and unpatented features.[f] The

[a] Boesch *v.* Graff, 133 U. S. 697.

[b] U. S. R. S., § 4921.

[c] Wooster *v.* Taylor, 14 Blatch. 403.

[d] Birdsall *v.* Coolidge, 93 U. S. 64; Child *v.* Boston & Fairhaven Iron Works, 19 F. R. 258; Simpson *v.* Davis, 22 Blatch. 113.

[e] Marsh *v.* Nichols, Shepard & Co., 128 U. S. 605.

[f] Garretson *v.* Clark, 111 U. S. 120; Dobson *v.* Hartford Carpet Co., 114 Id. 439; Reed *v.* Lawrence, Same *v.* Chase, 29 F. R. 915.

burden of proof in equity is on the plaintiff, to show that the defendant has made any profits, and their amount.[a] So where the article manufactured is a finished machine, and the infringement only covers one of its parts, it is not sufficient to show the profits on the whole machine; but the plaintiff must show what part of these profits is due to the patented invention. In Garretson *v.* Clark[b] Blatchford, J., said:

"The patentee must, in every case, give evidence tending to separate or apportion the defendant's profits and the patentee's damages, between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature."

Where, however, the defendant claims an allowance for some improvement he has made to the plaintiff's invention, the burden is on the former to show the amount of allowance. In Carter *v.* Baker,[c] in an action at law, Sawyer, J., while charging the jury, that the burden of proof as to damages was on the plaintiffs, said, that if the defendant had improved the machine, and if any of the profits were properly credited to this improvement, they did not belong to the plaintiffs; but, as the defendant had caused the confusion of rights, the burden of proof was on him to show how much was due to his improvement. This case was approved and followed in a suit in equity.[d] The defendant in that case had added

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[a] Gould's Mfg. Co. *v.* Cowing, 12 Off. Gaz. 942; Brady *v.* Atlantic Works, 15 Off. Gaz. 965; *cf.* Mowry *v.* Whitney, 14 Wall. 620.

[b] 15 Blatch. 70, 78; 111 U. S. 120.

[c] 4 Fish. 404.

[d] Elizabeth *v.* Pavement Co., 97 U. S. 126, 141, 142.

an improvement to the plaintiff's patent. The court said:

"The Nicholson pavement was a complete thing, consisting of a certain combination of elements. The defendants used it as such—the whole of it. If they superadded the addition made to it by Brocklebank and Trainer, they failed to show that such addition contributed to the profits realized. The burden of proof was on them to do this. . . . . It is not the case of a profit derived from the construction of an old pavement together with a superadded profit derived from adding thereto an improvement made by Nicholson, but of an entire profit derived from the construction of his pavement as an entirety. A separation of distinct profit derived from Brocklebank and Trainer's improvement, if any such profit was made, might have been shown; but, as before stated, the appellants failed to show that any such distinct profit was realized."

The general rule seems to be, that each party must show what has been derived from the use of his own property.

§ 1244. **Interest on profits and license fees.**—In equity the general rule is that interest cannot be allowed on the profits which the plaintiff recovers.[a] In Mowry *v.* Whitney[b] the court said: "The profits which are recoverable against an infringer of a patent are in fact a compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits, they are really damages, and unliquidated until the decree is made. Interest is not generally allowable upon unliquidated damages." The court, however, intimated that in some cases interest might be allowed, but that in this case the infringement not having been wanton,

[a] Silsby *v.* Foote, 20 How. 378, 386; Parks *v.* Booth, 102 U. S. 96, 106; Tilghman *v.* Proctor, Proctor *v.* Tilghman, 125 U. S. 136; Littlefield *v.* Perry, 21 Wall. 205; Brady *v.* Atlantic Works. 15 O. G. 965.

[b] 14 Wall. 620, 653.

the defendant should not be charged with interest. In Littlefield *v.* Perry ([a]) the court said: "Circumstances may, however, arise which would justify the addition of interest in order to give complete indemnity for losses sustained by wilful infringements." In Tilghman *v.* Proctor, ([b]) a bill in equity for profits and damages, the court reaffirmed this rule, and said:

"If the question thus presented were a new one, it would require grave consideration. But by a uniform current of decisions of this court, beginning thirty years ago, the profits allowed in equity for the injury that a patentee has sustained by the infringement of his patent, have been considered as a measure of unliquidated damages, which, as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained; and the provision introduced in the patent act of 1870 (act of July 8, 1870, c. 230, § 55; 16 Stat. 206), regulating the subject of profits and damages, made no mention of interest, and has not been understood to affect the rule as previously announced.([c]) Nothing is shown to take this case out of the general rule. At the time of the infringement, the fundamental question of the validity and extent of Tilghman's patent were in earnest controversy and of uncertain issue."

And interest was therefore allowed only from the day of the submission of the master's report upon the amount ascertained to be due. It is an illustration of, rather than an exception to, this principle, that where a report had been sent back merely for the correction of errors in the accounts stated, the patentee was allowed interest on the correct amount from the date of the original re-

([a]) 21 Wall. 205, 230.

([b]) 125 U. S. 136, 160.

([c]) See, in addition to cases above cited, Mowry *v.* Whitney, 14 Wall. 620, 651; Littlefield *v.* Perry, 21 Wall. 205, 229; Railway Co. *v.* Root, 105 U. S. 189, 198, 200, 204; Illinois Central R.R. Co. *v.* Turrill; Michigan So. & N. I. R.R. Co. *v.* same, 110 U. S. 301, 303.

port.[a] In Steam Stone Cutter Co. *v.* Windsor Mfg. Co.[b] interest was allowed on profits from the date of the interlocutory decree,[c] "because ever after that the detention was known to be wrongful." On the same principle interest was allowed in Burdett *v.* Estey[d] from the date of a disclaimer made by plaintiff, by means of which he became entitled to a decree. Up to that time the court said the defendant only knew that he had a right to disclaim, not that he would actually do so. In Bates *v.* St. Johnsbury & L. C. R.R. Co.[e] interest was allowed by the referee from a date when a demand for payment appeared to have been made. It was held that although damages do not carry interest as such, interest may be allowed as a part of the damages by the trier of fact, and that this was only "a mode of stating the amount found." Interest is allowed on royalties from the time when they should have been paid, and it has been very truly said that it is difficult, on principle, to see why, whenever a loss appears to have been incurred *at a certain time*, interest should not be allowed from that time.[f] In the case of profits, as a general rule, there is no fixed time, short of the decree.

§ 1245. **Interest on expenses.**—It is said in Herring *v.* Gage,[g] in the case of a patent for cooling and drying meal (though the remark was *obiter*), that in a proper case, as where it has been actually paid on capital bor-

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[a] Illinois Central R.R. Co. *v.* Turrill, *ubi supra;* Railroad Co. *v.* Turrill, 101 U. S. 836; Turrill *v.* Illinois C. R.R. Co; Same *v.* Michigan So. & N. I. Co., 20 Fed. R. 912.

[b] 17 Blatch. 24.

[c] So in Graham *v.* Geneva Lake C. Mfg. Co., 24 Fed. Rep. 642.

[d] 19 Blatch. 1.

[e] 32 F. R. 628.

[f] Creamer *v.* Bowers, 33 F. R. 206.

[g] 15 Blatchf. 124, 129; *cf.* Van Ende *v.* Seabury, 43 F. R. 672.

rowed, interest should be allowed the infringer; but as it was not shown that any interest, or any sum for cost of power, had been paid, or any indebtedness incurred therefor, it was properly disallowed.

§ 1246. **Counsel fees.**—As a general rule no allowance is made for expenses in equity suits beyond taxable costs.[a]

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[a] Parks *v.* Booth, 102 U. S. 96, 106; *vid.* § 235.

CHAPTER XLI.

THE MEASURE OF DAMAGES UNDER THE CIVIL DAMAGE STATUTES.

§ 1247. Principles on which the statutes rest.
1248. Where death ensues.
1249. Means of support.
1250. Other damages.
1251. Sales by several persons.
§ 1252. Acquiescence a bar.
1253. Avoidable consequences.
1254. Exemplary damages.
1255. Excessive damages.
1256. Mental suffering.

§ 1247. **Principles on which the statutes rest.**—The statutes of many States contain provisions giving damages aganst the seller of intoxicating liquors for injuries resulting from their sale. Sometimes the act gives the right of action to every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person, property, or means of support, against the seller, and also against any person or persons owning or renting, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are sold therein, for all damages sustained, and for exemplary damages; sometimes no action is given against the person owning the premises on which the liquor is sold. The statute in New Hampshire gives the right of action when the liquor has been unlawfully sold;[a] and in Wisconsin only against a person who has been notified, or requested in writing, not to part with liquor to a minor or habitual drunkard.[b] In Michigan it has

[a] Gen. St. 1878, ch. 109, § 33.
[b] Sanborn & Berryman's Annot. Stat. 1889, § 1556.

been said that the intention of the statute is that if there has been an injury which the defendant has contributed to produce, he shall be liable for the whole injury; but that where it appears that the defendant's act in supplying liquor had no appreciable effect in causing the damage, the jury cannot find for the plaintiff.(a) In the same State, a wife suing under the civil damage act cannot show that she has children, as, under the statute, each child has a separate action.(b)

In a New York case, the plaintiff alleged that her husband had been made intoxicated through the defendant's selling to him; that while so intoxicated he shot and killed one B., and was thereupon tried and convicted, and sent to prison for life. Under these circumstances it was held that his wife could recover for deprivation of means of support.(c) Such a case would seem to show that the ordinary rule of *causa proxima* does not apply to these statutes: and indeed it can hardly be that it does. At common law, we presume that it may be safely said that the consequences of a man's intoxication (except in such cases as drugging or hocussing) are due to his own volition, and not to the act of the vendor in selling, still less to that of the lessor of the vendor in leasing premises for the sale of liquor. In the application of the statutes, the courts are compelled to violate many of the rules regarding causal sequence, as well as certainty of proof, commonly applied in actions at law. Still the courts endeavor, as far as possible, to confine the right of recovery within reasonable limits. Generally speaking, if no connection whatever can be shown between the intoxication and the injury, a recovery will not be al-

(a) Steele *v.* Thompson, 42 Mich. 594.
(b) Rosecrants *v.* Shoemaker, 60 Mich. 4.
(c) Beers *v.* Walhizer, 43 Hun 254.

lowed.(a) Thus, in a case in Illinois, where an habitual drunkard was killed while in a state of intoxication, and his wife brought a joint action against certain persons who sold him liquor on the day of his death, and others who were charged with causing the habit of intoxication, it was held that the latter could not be charged, the sales on the day of his death being an intervening cause.(b)

The attempt has been made in Georgia, which has no civil damage statute, to apply the principle of these acts to the statute allowing a recovery for death caused by crime, or "criminal or other negligence." But the court not being able to find the necessary causal connection between the act of furnishing to a third person, and the death of the plaintiff, refused to hold the defendant liable.(c) In New York it seems to be settled that when death ensues, the question is not whether the death was the natural, reasonable, or probable consequence of defendant's act, but it was enough if intoxication, caused in whole or in part by liquors sold by the defendant, was the cause of the death, if by reason thereof plaintiff's means of support were injuriously affected.(d) In Massachusetts a statute (e) provides that the husband, wife, parent, child, guardian, or employer of any person having the habit of drinking to excess, may have a civil action against any one who sells such person intoxicating liquor after notice not to do so;

(a) Steele *v.* Thompson, 42 Mich. 594; *cf.* Mulcahey *v.* Givens, 115 Ind. 286; McMahon *v.* Sankey, 24 N. E. Rep. 1027 (Ill.).

(b) Tetzner *v.* Naughton, 12 Ill. App. 148; *cf.* Murphy *v.* Curran, 24 Ill. App. 475.

(c) Belding *v.* Johnson (Ga.), 12 S. E. Rep. 304.

(d) Beers *v.* Walhizer, 43 Hun 254; Blatz *v.* Rohrbach, 42 Hun 402; Volans *v.* Owen, 74 N. Y. 529; Mead *v.* Stratton, 87 N. Y. 496; Neu *v.* McKechnie, 95 N. Y. 636, McCarty *v.* Wells, 51 Hun 172; s. c., 4 N. Y. Sup. 672.

(e) Pub. St., 1882, c. 100, § 25.

and may recover "such sum, not less than $100 nor more than $500, as may be assessed as damages." The action under this statute is held to be penal, and hence common-law rules as to damages cannot in all respects be applied to it.[a] In Pennsylvania the language of the statute is that "any one aggrieved may recover full damages" for "any injury to person or property." Under this statute it has been held that a father cannot recover money spent for medical service, nursing, etc., in the case of his son, the latter being of full age, and no family relation subsisting.[b]

§ 1248. **Where death ensues.**—Whether damages can be recovered where death has ensued from the sale of intoxicating liquors has been considered in several cases, and the courts, even in the same State, have sometimes arrived at opposite conclusions. In Hayes *v.* Phelan,[c] where the plaintiff's husband died from intoxication, it was held in an action against the seller of the liquors that "injured" in the statute meant a legal injury; that the object of the action was to allow a recovery against the remote wrong-doer, to wit: the seller of the liquor, in addition to the action against the immediate wrong-doer, and that there could only be an action against the seller, where an action existed against the intoxicated person, and that hence there could be none in this case. In Jackson *v.* Brookins,[d] where the plaintiff's husband was killed in an affray while intoxicated, it was held that she could recover damages resulting from the death. In Quain *v.* Russell[e] the same view was adopted; while

[a] Sackett *v.* Ruder, 25 N. E. Rep. 736 (Mass.).

[b] Veon *v.* Creaton, 20 Atl. Rep. 865 (Pa.).

[c] 4 Hun 733; but see dissenting opinion in this case of James, J., reported in 5 Hun 335.

[d] 5 Hun 530.

[e] 8 Hun 319.

in Brookmire *v.* Monaghan ([a]) the opposite view was taken. The Court of Appeals has, however, held, in the case of Volans *v.* Owen,([b]) that a new cause of action is given by the statute, and that an action against the seller can be maintained for injury to the means of support, although no action would lie against the intoxicated person. The same view has been taken in Illinois; ([c]) and so, too, in Nebraska.([d]) But the rule, that the plaintiff cannot recover damages for the death of her husband arising from the sale of intoxicating liquors, is adopted in a case in Ohio,([e]) where the same view of the statute is taken, as in the opinion of the majority of the court in Hayes *v.* Phelan, above cited. McIlvaine, J., in delivering the opinion of the court, says:

"She had an interest in his labor, and in his capacity to labor, as a means of support, during his life; but after his death this means of support no longer existed, and was not the subject of injury or diminution. But to avoid any charge of hypercriticism, we place our decision upon the ground that in view of the previous state of the law, and the mischief sought to be remedied, we can find no expression in the statute that indicates an intention on the part of the legislature to bring the loss of labor caused by the death of the person intoxicated within the meaning of the term 'means of support,' for an injury to which the right of action is given by the statute." ([f])

But see dissenting opinion of Boynton, J., in this case, referred to below. The question is not without difficulty, owing to the absence from the statute of a provision expressly covering injuries resulting from death. It is said, however, with much force, that the statute does not de-

([a]) 15 Hun 16.
([b]) 74 N. Y. 526.
([c]) Emory *v.* Addis, 71 Ill. 273.
([d]) Roose *v.* Perkins, 9 Neb. 304.
([e]) Davis *v.* Justice, 31 Ohio St. 359; *acc.* Kirchner *v.* Myers, 35 Oh. St. 85.
([f]) Davis *v.* Justice, 31 Oh. St. 359, 364.

fine or enumerate the injuries intended to be covered, but mentions generally injuries to person, property, or means of support in consequence of the intoxication of any person, and that if death ensues as the natural and legitimate result of the intoxication, it is covered by the language of the statute; that if death were excluded, then the minor and temporary injuries would be provided for, while the greatest and most permanent of all would be excluded.(a) It is true, that at common law, in actions for wrongs, a recovery could only be had for injuries to person or property. But the question naturally arises, whether the legislative intent of the statute under consideration was not to go beyond the common-law rule, and provide a remedy for injuries produced by intoxication to the means of support of the injured party, whether the injury arose from a temporary cause, such as sickness, or from a permanent cause, such as death. This view is taken by James, J., in the dissenting opinion in Hayes *v.* Phelan, and is very ably maintained by Boynton, J., in the dissenting opinion in Davis *v.* Justice. The learned judge regards the construction given to the statute by the majority of the court as violating both its letter and spirit, and that its provisions clearly indicate a purpose, on the part of the legislature, to require the seller and the owner of the premises, when liable, to make full and adequate compensation in damages to the party injured through their violation of the statute. He says:

"The argument of counsel . . . . and the judgment of the court seem to be founded on the mistaken notion that the action is brought to recover damages for the death of the husband. Such is not the case. The wrongful act which constitutes the

(a) Jackson *v.* Brookins, 5 Hun 530; in New York it is not necessary that the death should have been in the contemplation of the seller; it is enough if the proximate cause is the selling: Davis *v.* Standish, 26 Hun 608.

ground of the action, is the illegal sale of the liquor, causing the intoxication from which the injury results. The death of the husband only affects the measure of damages. It destroys his ability to labor, and thereby diminishes the wife's means of support. If the husband had lost both his arms or legs, or become permanently insane, in consequence of the intoxication, or had otherwise become permanently disabled to perform physical labor, and had survived, the result to the wife would have been precisely the same. Her injury, in either case, would consist in the deprivation of the means of support resulting from the loss of her husband's ability to labor. There is not the slightest foundation, in reason or justice, for an intention upon the part of the legislature to authorize a recovery for an illegal sale causing intoxication resulting in injury, where death does not follow, and to refuse damages where death results. Indeed, there is much more reason to award damages for the injury in the latter case than in the former. That the legislature intended to authorize a recovery in the one case, and not in the other, is an assumption not only not warranted by, but in clear contravention of the express provisions of the statute."[a]

Where damages for death of a husband caused by the sale of intoxicating liquors were allowed, it was held that the jury might estimate the damages, with reference to the fact that it is the duty of the husband to provide the wife with present support, as well as maintenance for the future, and that she is entitled to such a sum as, in a pecuniary point of view, would make her whole.[b]

§ 1249. **Means of support.**—The same rule as stated in Rafferty *v.* Buckman, *supra*, may be laid down in reference to the other injuries to the means of support than by death. In Mulford *v.* Clewell,[c] the plaintiff's husband was an habitual drunkard. He squandered his own

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[a] Davis *v.* Justice, 31 Oh. St. 359, 369.

[b] Rafferty *v.* Buckman, 46 Ia. 195. See also Roose *v.* Perkins, 9 Neb. 304, for a statement of the facts to be considered in estimating the damages where death has ensued.

[c] 21 Ohio St. 191.

money, sold some of her property, and became unable to work. At times he was wild and delirious, and she was obliged to attend him, and had been put in much fear, and finally compelled to leave the house. It was held that it was not necessary that the plaintiff should have been actually without support, or at any time have been deprived, in whole or in part, of means of support; that means of support relates to the future as well as to the present; that it is enough if she show that the sources of her future support have been cut off, or diminished below what is reasonable and competent for a person in her station in life, and below what they otherwise would have been. It was also held, that it need not appear that the injury resulted directly and immediately from the drunkenness, during its continuance, but sufficient if it be shown to result from insanity, sickness, or inability produced by intoxication; that to destroy the health of the husband, and his ability to labor, is to destroy her means of support. In Dunlavey *v.* Watson ([a]) it was held proper for the jury, in awarding damages to the wife, to consider the husband's age, condition in life, and habits of industry, and ability to support his wife, and, in Wightman *v.* Devere,([b]) where the plaintiff's husband, while intoxicated, had a fall and was injured so that he was unable to do his work on the farm, and the plaintiff had to hire another man to do the work, and had to pay the doctor's bills, it was held that the husband's ability to labor was one of the plaintiff's means of support, and that an injury to this would entitle her to recover; that, also, the physician's bill and the expenses of hiring a man to work, were proper items of claim under the statute. But in Kellerman *v.* Arnold,([c]) where the

([a]) 38 Ia. 398. ([b]) 33 Wis. 570. ([c]) 71 Ill. 632.

plaintiff's husband had been an habitual drunkard for years before the passage of the act, and when sober could earn $3 to $5 a day, but when drunk would spend all his earnings for drink, and had pawned several articles to defendant for drinks, it was held, three judges dissenting, that the plaintiff had shown no injury to property, person, or means of support. And in Meidel *v.* Anthis,(a) where the husband supported his family by the cultivation of land, and the evidence showed that the plaintiff spent her time in nursing and taking care of her husband, but there was no evidence of a diminution of the capacity of the husband to labor, it was held that the plaintiff was not entitled to recover. In Volans *v.* Owen,(b) the defendant sold liquor to the plaintiff's son, who became intoxicated, was injured, and was confined to his bed for several months. The only evidence of the plaintiff's pecuniary condition was that he owned and cultivated a farm of 100 acres. He was put to medical expense and was deprived of the aid his son usually gave him on the farm. It was held, that there was no evidence of injury to the plaintiff's means of support. The court said:

"Where injury to 'means of support' is the gravamen of the action, the plaintiff, in order to maintain the action, must show that, by or in consequence of the intoxication or the acts of the intoxicated person, his accustomed means of maintenance have been cut off or curtailed, or that he has been reduced to a state of dependence, by being deprived of the support which he had before enjoyed; and that, in this case, the plaintiff cannot recover for loss of service or the expenses of his son's illness, under the words 'means of support,' without proof that the services were necessary to his support, or that the charge brought

(a) 71 Ill. 241.

(b) 74 N. Y. 526, 530. For construction of term "means of support" in the statute, see, also, Schneider *v.* Hosier, 21 Ohio St. 98.

upon him, by his son's illness, diminished his means, so as to render them inadequate therefor. The primary purpose of the legislature, in giving a right of action for an injury of this character, was the protection of the dependent and helpless. Diminution of income, or loss of property, does not constitute an injury to means of support, within the fair intendment of the statute, if the plaintiff, notwithstanding, has adequate means of maintenance, from accumulated capital or property, or his remaining income is sufficient for his support."

In Weitz *v.* Ewen ([a]) it was held that the jury might consider what the earnings of the husband would have been if sober. In Sharpley *v.* Brown ([b]) it was held that the remarriage of the plaintiff might be shown as bearing on the means of support. Generally speaking, these statutes are for the benefit of married women and children. In Michigan, where a father voluntarily assumed the support of an adult son, as a poor person (under a statute), it was held that he might recover under the civil damage act, for his outlay in necessary support, based on the probabilities of life of his son and himself.([c]) Where the gist of the action is injury to the means of support, evidence is usually admissible as to the amount necessary for such support under ordinary circumstances.([d]) In such actions the fact that the plaintiff was previously a sober and industrious man, and afterwards became idle and neglected his work, is proper for the consideration of the jury.([e]) Where the action is simply for the injury to the wife's means of support, it is error to allow evidence as to the number of children.([f])

([a]) 50 Ia. 34.

([b]) 43 Hun 374.

([c]) Clinton *v.* Laning, 61 Mich. 355.

([d]) McMahon *v.* Sankey, 24 N. E. Rep. 1026 (Ill.); Warrick *v.* Rounds, 17 Neb. 411; Thill *v.* Pohlman, 76 Ia. 638.

([e]) Jockers *v.* Borgman, 29 Kas. 109.

([f]) Larzelere *v.* Kirchgessner, 73 Mich. 276; Johnson *v.* Schultz, 74 Mich. 75.

Where injury to person, property, and means of support are the gist of the action, prospective damages are allowed, and include expenses of medical attendance, the necessity of doing additional labor, and almost every species of damage.[a] Generally speaking, in these actions resort may be had to the tables in common use, showing the expectation of life.[b] In Michigan it has been held that although plaintiff's husband had been a drunkard for ten years and contributed nothing to her support, still she is entitled at least to the amount of his earnings spent in liquor.[c]

§ 1250. **Other damages.**—The cases in which damages are given for injuries other than to means of support consequent upon the intoxication of the person doing the injury, illustrate the general rule that the measure of damages depends upon the extent of the injury. Thus, in Bertholf *v.* O'Reilly,[d] the son of the plaintiff, on a Sunday, took the plaintiff's horse, saying that he was going to see a friend, but instead went directly to the defendant's place and became intoxicated there, and, when in such a state, drove the horse so violently that it died. It was held that he could recover the value of the horse. In Morenus *v.* Crawford[e] it was held that plaintiff, a married woman, could recover, under the civil damage act, for a horse belonging to her, killed by her husband while intoxicated. In Aldrich *v.* Sager,[f] where the defendant sold liquor to the son-in-law of the plaintiff, who became intoxicated thereby, and in consequence thereof drove a team behind which he and the plaintiff's wife were rid-

[a] Thomas *v.* Dansby, 74 Mich. 389.
[b] Sellars *v.* Foster, 27 Neb. 118.
[c] Rouse *v.* Melsheimer, 82 Mich. 172.
[d] 8 Hun 16; aff'd 74 N. Y. 509.
[e] 51 Hun 89.
[f] 9 Hun 537.

ing, so recklessly as to upset the wagon and break the wife's arm, it was held that the husband was entitled to recover for the loss of her service and the expense of medical attendance. In Kilburn *v.* Coe,(a) where the plaintiff's intestate was an habitual drunkard, and the defendant sold him liquor, it was held that an action could be maintained to recover money paid for the liquor, as one of the consequences of the sale was to deprive the purchaser of the price paid. In Peterson *v.* Knoble,(b) where plaintiff's husband became intoxicated from liquor sold by the defendant, and by threatening and frightening the plaintiff, compelled her to leave the house and remain away until he became sober, it was held that turning the plaintiff out of doors was an injury for which an action could be maintained by her.

§ 1251. **Sales by several persons.**—The question of the liability, under the statute, of several persons for the result of injuries done by a person intoxicated on liquor purchased from them, has also come before the courts, and, in Boyd *v.* Watt,(c) where the plaintiff's husband was a practicing physician, and became an habitual drunkard, and died from the effects: it was held, that the defendant was only liable for his own illegal acts, but that this was an action for damages on account of habitual intoxication, not for special cases of intoxication. That if defendant's course was one which tended to produce this, he was liable for all damages, although others may have contributed. That he was one of the joint tort-feasors, and the fact that no conspiracy or agreement existed between the tort-feasors did not make any difference; each was liable for all damages. In Woolheather

(a) 48 How. Pr. 144.
(b) 35 Wis. 80.
(c) 27 Oh. St. 259.

v. Risley ([a]) it was held that the fact that defendant was aided by others in committing a wrong, and did not do it solely, would not relieve him from the consequences of that wrong, if he contributed to the intoxication. In Jewett *v.* Wanshura,([b]) where several persons had sold intoxicating liquors to the husband, a settlement by the wife with one of them, it was held, did not operate to discharge the others from liability; but, in Morenus *v.* Crawford,([c]) where the plaintiff brought an action against the defendants to recover the value of a horse belonging to her separate estate, which was killed by her husband while intoxicated on liquors purchased from the defendants, it was held that no recovery could be had on evidence of separate sales.

On the other hand, in Iowa it seems to be now settled that where there are a series of sales a joint action will not lie, and the defendant is not liable for damages to which he did not contribute.([d]) In Massachusetts it has been held that, in an action for causing intoxication, the defendant is liable for any results of intoxication, although the liquor sold by the defendant contributed only in part to the intoxication; but he is not liable for the formation of habits of intoxication where other parties sold liquor.([e]) The present Nebraska statute makes every one who contributes to the intoxication liable.([f]) Under the Kansas statute each seller is responsible.([g])

([a]) 38 Ia. 486. ([b]) 43 Ia. 574. ([c]) 15 Hun 45.

([d]) Huggins *v.* Kavanagh, 52 Ia. 368; Jackson *v.* Noble, 54 Iowa 641; *acc.* Kirchner *v.* Myers, 35 O. St. 85; Ennis *v.* Shiley, 47 Ia. 552; Engleken *v.* Webber, ib. 558; Kearney *v.* Fitzgerald, 43 Id. 580; Hitchner *v.* Ehlers, 44 Id. 40; La France *v.* Krayer, 42 Id. 143; Flint *v.* Gauer, 66 Id. 696; Richmond *v.* Shickler, 57 Id. 486.

([e]) Bryant *v.* Tidgewell, 133 Mass. 86.

([f]) Kerkow *v.* Bauer, 15 Neb. 150; Elshire *v.* Schuyler, ib. 561.

([g]) Jockers *v.* Borgman, 29 Kas. 109.

§ 1252. Acquiescence a bar.—Acquiescence by the persons seeking to recover in the obtaining of liquor for the person doing the injury, or in uniting with him in drinking, or permitting him to drink, when the party bringing the action might have interposed and prevented, are held sufficient to bar a recovery under the statute.[a] Thus, in Engleken *v.* Hilger[b] it was held that the wife could not recover damages from the seller of intoxicating liquors for injuries committed by her husband upon herself, while he was intoxicated, if she has contributed to his intoxication by purchasing the liquor, or uniting with him in drinking it. In Reget *v.* Bell,[c] the plaintiff's husband, who was a hard-working man, subject to occasional fits of intemperance, but who treated her kindly at all times, bought a jug of whiskey and put it by his bedside one night, and in the morning it was nearly all gone. He died from the effects of the liquor; and it was held that, from the testimony, it was plain that the plaintiff could have taken the whiskey away from her husband; and, from the evidence as to character, it would not do for her to say she was afraid, but she must be considered to have been a willing party to her husband's conduct, and, therefore, could not recover. But where the acquiescence of the wife is attended with circumstances which justify the conclusion that she acted under the coercion of her husband, her acquiescence in the sale of the liquor to him will be no defense. Thus, in Jewett *v.* Wanshura,[d] where the plaintiff forbade the defendant to sell liquor to her husband, but a day or two thereafter the plaintiff and her husband went to the defendant's saloon, and counter-

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[a] Elliott *v.* Barry, 34 Hun 129.

[b] 43 Ia. 563.

[c] 77 Ill. 593. See, also, Kearney *v.* Fitzgerald, 43 Ia. 580.

[d] 43 Ia. 574.

manded her previous order, and the plaintiff proved that she was compelled to retract her order by the threats of her husband that he would abandon her and take her child from her; although knowledge of these threats was not brought home to the defendant, it was held that there was a reasonable inference to be drawn from the conduct of the plaintiff, that she acted under restraint, and that the defendant was therefore liable. The act of a married woman in signing a petition for defendant's license as a seller does not operate as a bar; it is no acquiescence in his subsequently injuring her by a violation of the act.([a])

§ 1253. **Avoidable consequences.**—As acquiescence is a bar, so no doubt the rule of avoidable consequences applies. The remarks of the Supreme Court of Nebraska, in Warrick *v.* Rounds,([b]) on this subject only go to show that the rule was not applicable under the circumstances under consideration.

§ 1254. **Exemplary damages.**—That exemplary damages can only be recovered, under the statute, where actual damages are sustained, is well settled.([c]) And where the defendant's servant, in disobedience of his master's order, sold liquor to the plaintiff's husband, who became intoxicated, and thereby the plaintiff was injured in her means of support, it was held that the court below should

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([a]) Jockers *v.* Borgman, 29 Kas. 109.

([b]) 17 Neb. 411.

([c]) Freese *v.* Tripp, 70 Ill. 496; Meidel *v.* Anthis, 71 Id. 241; Fentz *v.* Meadows, 72 Id. 540; Graham *v.* Fulford, 73 Id. 596; Albrecht *v.* Walker, Ib. 69; Ganssly *v.* Perkins, 30 Mich. 492; Rouse *v.* Melsheimer, 82 Mich. 172; McMahon *v.* Sankey, 24 N. E. Rep. 1027 (Ill.); Kennedy *v.* Sullivan, 26 N. E. Rep. 382 (Ill.); Weitz *v.* Ewen, 50 Ia. 34; Rosecrants *v.* Shoemaker, 60 Mich. 4; Mead *v.* Stratton, 87 N. Y. 493; Neu *v.* McKechnie, 95 Id. 632. Causing the plaintiff's husband to use threatening language, etc., is not a ground for exemplary damages. Calloway *v.* Laydon, 47 Ia. 456.

have instructed the jury that exemplary damages could not be awarded, unless the act of giving or selling intoxicating liquor to the husband of the plaintiff was wilful.[a] To the same effect see Ganssly *v.* Perkins.[b] It is also held that the defendant can show, in mitigation of exemplary damages, that the liquor was sold by his servant in disobedience of his order.[c]

In New York, where the statute expressly allows exemplary damages, the fact that the defendant was selling liquor without a license may be considered as a basis for exemplary damages.[d] The ordinary common-law rules govern the allowance of exemplary damages, and malice or some bad motive or evil intent must be shown.[e] In Secor *v.* Taylor,[f] the court says that if half a dozen actions are brought for the single act of permitting lessees to sell, the defendant should at least be entitled to have any prior judgments for exemplary damages brought before the jury, in order that they may know how much punishment has already been inflicted. In Ketcham *v.* Fox [g] it was held that a lessor, in the absence of any evidence to show that he had knowledge of the circumstances under which the liquor was sold, was not liable in exemplary damages. It is held in Iowa that exemplary damages may be recovered wherever there has been a wilful violation of the statute.[h]

Exemplary damages are awarded on account of the

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[a] Kreiter *v.* Nichols, 28 Mich. 496.

[b] 30 Mich. 492.

[c] Fentz *v.* Meadows, 72 Ill. 540; Freese *v.* Tripp, 70 Id. 496. In Nebraska it is held that no exemplary damages can be given. Roose *v.* Perkins, 9 Neb. 304.

[d] Davis *v.* Standish, 26 Hun 608.

[e] Rawlins *v.* Vidvard, 34 Hun 205; Kadgin *v.* Miller, 13 Ill. App. 474.

[f] 41 Hun 123; *cf.* Reid *v.* Terwilliger, 42 Id. 310.

[g] 52 Hun 284.

[h] Fox *v.* Wunderlich, 64 Ia. 187.

misconduct of the defendant. Hence, where the evidence showed that the plaintiff notified defendant not to sell any more liquor to her husband, he being an habitual drunkard, and his habits being necessarily known to defendant, it was held that the case came within the rule.(a) On the other hand, it is erroneous to require the jury to find exemplary damages if they find actual damages. This is for the jury to determine under proper instructions.(b) In Indiana, where the act is punishable criminally, exemplary damages are not allowed.(c)

§ 1255. **Excessive damages.**—In some cases the damages awarded under the statute have been held excessive, as in Franklin *v.* Schermerhorn.(d) In this case the plaintiff's husband was a cripple, and could earn but little. He had a pension of $54 a quarter, became intoxicated and lost $50, and the jury gave the plaintiff $75. It was held to have been too large, and that the verdict should have been for $50. But in Roth *v.* Eppy,(e) where the plaintiff brought an action against defendant for sale and gift of liquors to her husband, whereby he became habitually intoxicated and then insane, it was held that $1,200 damages were not excessive for the injury to her means of support.

§ 1256. **Mental suffering.**—It is clearly settled that mental suffering is not a ground for the recovery of damages, under the statute, where by its terms the recovery is con-

(a) Jockers *v.* Borgman, 29 Kas. 109. In Michigan, it seems, a mere notice not to sell is enough. Larzelere *v.* Kirchgessner, 73 Mich. 276; Rouse *v.* Melsheimer, 82 Mich. 172.

(b) Tetzner *v.* Naughton, 12 Ill. App. 148; Schimmelfenig *v.* Donovan, 13 Id. 47; but see Thill *v.* Pohlman, 76 Ia. 638.

(c) Schafer *v.* Smith, 63 Ind. 226.

(d) 8 Hun 112.

(e) 80 Ill. 283.

fined to cases of injury to person or property.[a] But the statute may be broader than this. Thus, in Michigan, it covers any injury, and accordingly in that State it has been held that it would be a "mockery of justice" to exclude evidence of mental anguish, disgrace, and loss of society and companionship in the case of a married woman;[b] though the general rule, even in that State, seems to be to exclude damages for mental suffering.[c]

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[a] Mulford *v.* Clewell, 21 Ohio St. 191; Kearney *v.* Fitzgerald, 43 Iowa 580; Freese *v.* Tripp, 70 Ill. 496; Meidel *v.* Anthis, 71 Id. 241; Calloway *v.* Laydon, 47 Ia. 456.

[b] Friend *v.* Dunks, 37 Mich. 25; *cf.* Johnson *v.* Schultz, 74 Mich. 75.

[c] Clinton *v.* Laning, 61 Mich. 355.

CHAPTER XLII.

PLEADING AND PRACTICE.

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Damages as Affected by the Plaintiff's Pleadings.

§ 1257. **Averment of damage.**—* The most important remark to be made on this part of our subject, is as to the necessity of distinctly averring in the declaration the damage of which the plaintiff complains. Great nicety was once used in regard to the peculiar mode of allegation; thus, it has been doubted whether an averment was suffi-

ciently clear and positive if preceded by the word "whereby," or "thereupon," on the ground that the words following the "whereby" or "thereupon" could not be considered as containing an averment of *matter of fact*, but merely matter of conclusion or inference drawn from the matters previously alleged. But it now seems to be well settled, that where the allegation following such a word as "thereupon" or "whereby" is clearly intended as an *allegation* of fact, the matter is to be considered averred with sufficient directness; the word "thereupon" or "whereby" not being understood as showing that the proposition following such word is intended to be stated as a consequence deducible from what precedes, but only as showing the time at which, or the occasion on which, that which follows the word in question is averred to have taken place.[1] But if the averment is merely one of a legal liability, it is well established that such an averment, being one of matter of law, will not supply the want of those allegations of fact from which alone the court could infer the law to be as stated; so that such allegation is useless when the declaration is insufficient, and superfluous when sufficient without it. But the allegation of damage is only required to be of the fact as it exists in legal contemplation.(a) So an allegation that the plaintiff has been put to great expense, will be satisfied by proof that he has incurred a liability to pay;[2] *** though an allegation that the plaintiff has paid money will not be satisfied by such proof.(b)

[1] Pryce *v.* Belcher, 3 C. B. 58; Brown *v.* Mallett, 5 C. B. 599.

[2] Richardson *v.* Chasen, 10 Q. B. 756.

(a) But this rule of the common-law practice is changed by the new codes of procedure, which requires the statement of the actual facts, and not merely the averment of their legal effect. Garvey *v.* Fowler, 4 Sandf. 665.

(b) Pritchet *v.* Boevey, 1 Cr. & M. 775; Jones *v.* Lewis, 9 Dowl. Pr. 143; Ward *v.* Haws, 5 Minn. 440.

§ 1258. **Damages beyond amount laid.**—* In regard to the amount of damages to be averred, it is only necessary to lay them so high as to cover the injury; for no recovery can be had beyond the amount in the declaration.** If the jury assess the damages at a sum beyond the amount laid in the declaration, and judgment be entered for the whole amount of damages found by the jury, it is error.[1] ([a]) In Virginia and West Virginia judgment may exceed the amount averred by the amount of interest accrued since the filing of the declaration.([b])

In an action of replevin, however, the damages claimed in the writ are damages for detention; and the amount awarded as the value of the goods, upon the plaintiff's election to take such value, is not limited by the *ad damnum*.([c]) Where double damages are claimed, the actual damage is limited by the *ad damnum*, but the double damages may be given in addition.([d])

§ 1259. **Method of curing the error.**—If the jury render a verdict in excess of the amount averred to be due, the

[1] Hoblins *v.* Kimble, 1 Bulst. 49; Cheveley *v.* Morris, 2 W. Black. 1300; Curtiss *v.* Lawrence, 17 Johns. 111; Dox *v.* Dey, 3 Wend. 356; Fish *v.* Dodge, 4 Denio 311; Fowlkes *v.* Webber, 8 Humphreys 530; David *v.* Conard, 1 Greene (Iowa) 336.

([a]) White *v.* Cannada, 25 Ark. 41; Snow *v.* Grace, 25 Ark. 570; Wilcox *v.* Field, 1 Col. 3; Pierson *v.* Finney, 37 Ill. 29; Kelley *v.* Third Nat. Bank, 64 Ill. 541; Epperly *v.* Little, 6 Ind. 344; Hall *v.* Hall, 42 Ind. 585; Cameron *v.* Boyle, 2 Greene (Ia.) 154; Edwards *v.* Wiester, 2 A. K. Marsh. 382; Rowan *v.* Lee, 3 J. J. Marsh. 97; Attrill *v.* Patterson, 58 Md. 226; Taylor *v.* Jones, 42 N. H. 25; Hawk *v.* Anderson, 9 N. J. L. 319; Lake *v.* Merrill, 10 N. J. L. 288; Grist *v.* Hodges, 3 Dev. L. 198, 203; Lantz *v.* Frey, 19 Pa 366; Moore *v.* Republic of Texas, 1 Tex. 563. So, on a counter-claim, Annis *v.* Upton, 66 Barb. 370. But in Calumet I. & S. Co. *v.* Martin, 115 Ill. 358, it was held error to instruct the jury that they must not give damages above the *ad damnum*.

([b]) Cahill *v.* Pintony, 4 Munf. 371; Enoch *v.* Mining & P. Co., 23 W. Va. 314.

([c]) Anderson *v.* Carlin, 24 Fla. 199.

([d]) Rosevelt *v.* Hanold, 65 Mich. 414.

plaintiff may remit the excess before judgment without order of court,(a) but after judgment he cannot enter a *remittitur* without permission.(b) After judgment the court may give the plaintiff his election between entering a *remittitur* of the excess and retrying the case.(c)

§ 1260. **Averment of damage not otherwise material.**— * It was anciently held, both in actions of *indebitatus assumpsit* and *insimul computassent*, that the plaintiff could not recover any less amount of damages than the precise sum laid in the declaration.[1] But it is now well settled otherwise: and thus, even in an action on a policy of insurance averring a total loss, a recovery may be had for a partial loss.[2]** This necessarily follows from the fact that, except as fixing a limit beyond which recovery cannot be had, the averment of the amount of damages is not a material one. The amount of damages alleged is not a traversable averment, and is not admitted by a failure to deny it.(d) In some States it is provided by statute that in actions of contract no proof of damage shall be required upon default;(e) and in California the averment of amount of damages appears to be material in every case, so that upon failure to deny the

[1] Sayer on Damages, ch. x, p. 43 *et seq.*; Bagnal *v.* Sacheverel, Cro. Eliz. 292; Ramsden's case, Clayton 87.

[2] Chitty on Pleadings, vol. i, p. 371; Marshall on Insurance, 629.

(a) Harris *v.* Jaffray, 3 H. & J. 543; Cahill *v.* Pintony, 4 Munf. 371.

(b) Davenport *v.* Bradley, 4 Conn. 309.

(c) Lewis *v.* Cooke, 1 H. & McH. 159; Attrill *v.* Patterson, 58 Md. 226, 260; Crews *v.* Lackland, 67 Mo. 619; Herbert *v.* Hardenbergh, 10 N. J. L. 222; Corning *v.* Corning, 6 N. Y. 97; Wilde *v.* Crow, 10 Up. Can. C. P. 406. In Connecticut it was held that a *remittitur* could not be entered, but the case must go back to trial upon the question of damages only. Davenport *v.* Bradley, 4 Conn. 309.

(d) McLees *v.* Felt, 11 Ind. 218; Raymond *v.* Traffarn, 12 Abb. Pr. 52; Jenkins *v.* Steanka, 19 Wis. 126.

(e) Cole *v.* Hoeburg, 36 Kas. 263; White *v.* Northwest Stage Co., 5 Ore. 99.

amount the plaintiff recovers the whole amount claimed in his declaration.([a])

§ 1261. **Special damages.**—* A question of more frequent occurrence is, as to the necessity of averring the particular cause and extent of any special damage for which the plaintiff claims redress.**

"Damages," says Mr. Chitty,[1] "are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place and are not implied by law; and are either superadded to general damages arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves; or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing. . . . It does not appear necessary to state the formal description of damages in the declaration, because presumptions of law are not in general to be pleaded or averred as facts. . . . But when the law does not *necessarily imply* that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity. . . . And whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must in general state the particular damage which he has sustained, or he will not be permitted to give evidence of it."[2] ([b])

[1] Chitty on Pleading, 410, 411, cited in Dumont *v.* Smith, 4 Denio 319. "The damages sustained are matter of evidence, and need not be alleged, nor are they scarcely ever stated, but in a general manner." Barruso *v.* Madan, 2 Johns. 149.

[2] See, also, Chitty on Pleading, 370 *et seq.*, same subject. See, also, De Forest *v.* Leete, 16 Johns. 122, where it is held that in an action on the covenant against incumbrances, it was not enough to aver that the premises were incumbered, but that the declaration must set out the extinguishment of the incumbrance. See, also, Butler *v.* Kent, 19 Johns. 228; and Arrowsmith *v.* Gordon, 3 La. Ann. 105.

([a]) Patterson *v.* Ely, 19 Cal. 28: Dimick *v.* Campbell, 31 Cal. 238; Huston *v.* Twin & C. C. T. R. Co., 45 Cal. 550.

([b]) Lindley *v.* Dempsey, 45 Ind. 246; Burrage *v.* Melson, 48 Miss. 237; Fitch *v.* Fitch, 35 N. Y. Super. Ct. 302.

Mr. Chitty's satisfactory statements of the distinction between general and special damages leave little to be added. All legal damages must, whether the action be in contract or in tort, *naturally* result from the act or default complained of; and although the law in certain cases permits the recovery of such damages as are physically secondary or consequential, yet they must in legal contemplation be also its *proximate* result. Where such result is necessary, or is legally imported by the facts, the damages are general, and need not be specifically set forth in the pleading; ([a]) otherwise they must. In the one case, the statement of the cause of action sufficiently apprises the defendant of the extent of the claim. In the other, legal justice, in order to enable him to prepare his defense, requires the further averment of the injurious consequences. *A fortiori*, where special damage is essential to the maintenance of the action, such special damage must be alleged.([b]) Special damages must be pleaded in equity as in law.([c]) * But is no ground of demurrer to an entire breach in an action of covenant, that certain consequential damages alleged are not recoverable. If the plaintiff is entitled to recover for any damage, it is sufficient to support the breach.[1] **

[1] Amory *v.* Brodrick, 5 B. & Ald. 712.

([a]) Stevens *v.* Lyford, 7 N. H. 360; Hart *v.* Evans, 8 Pa. 13; Hutchinson *v.* Granger, 13 Vt. 386.

([b]) The Director, 11 Sawy. 494; Lewis *v.* Paull, 42 Ala. 136; Nunan *v.* San Francisco, 38 Cal. 689; Tucker *v.* Parks, 7 Col. 62; Bristol Mfg. Co. *v.* Gridley, 28 Conn. 201; Olmstead *v.* Burke, 25 Ill. 86; Roberts *v.* Hyde, 15 La. Ann. 51; McTavish *v.* Carroll, 13 Md. 429; Baldwin *v.* Western R.R. Co., 4 Gray 333; Warner *v.* Bacon, 8 Gray 397; Rice *v.* Coolidge, 121 Mass. 393; Shaw *v.* Hoffman, 21 Mich. 151; Chamberlain *v.* Porter, 9 Minn. 260; Troy *v.* Cheshire R.R. Co., 23 N. H. 83; Gove *v.* Watson, 61 N. H. 136; Ryerson *v.* Marseillis, 16 N. J. L. 450; Hallock *v.* Belcher, 42 Barb. 199; Solms *v.* Lias, 16 Abb. Pr. 311; Agnew *v.* Johnson, 22 Pa. 471; Birchard *v.* Booth, 4 Wis. 67.

([c]) Hooper *v.* Armstrong, 69 Ala. 343.

§ 1262. **Prospective damages.** — Prospective damages need not in general be specially averred.[a] But in an action by a husband for a battery on his wife it was held that damages from a permanent loss of her services must be specially alleged.[b] And the same was held in an action for death of an adult son.[c] Where the declaration alleged the injuries to have been committed between a day named and the date of the writ, the plaintiff was not allowed to recover damages to the date of the service of the writ.[d]

§ 1263. **Exemplary and treble damages.**—The claim for exemplary damages need not be specially pleaded.[e] But where such damages are claimed on the ground of malice, malice must be averred in the complaint.[f] But where statutory double or treble damages are claimed, the declaration must set out the statute.[g] The plaintiff, however, having claimed such statutory damages, may recover single damages if he does not prove himself to be entitled to the benefit of the statute.[h] In Osburn *v.* Lovell[k] it was held, that in an action of trespass, to recover treble damages, evidence that the tres-

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[a] Treadwell *v.* Whittier, 80 Cal. 574; Bradbury *v.* Benton, 69 Me. 194.

[b] Uertz *v* Singer Mfg. Co., 35 Hun 116.

[c] Winnt *v.* International & G. N. R.R. Co., 74 Tex. 32.

[d] Prouty *v.* Bell, 44 Vt. 72.

[e] Alabama G. S. R.R. Co. *v.* Arnold, 84 Ala. 159; Savannah, F. & W. Ry. Co. *v.* Holland, 82 Ga. 257; Gustafson *v.* Wind, 62 Ia. 281; Wilkinson *v.* Drew, 75 Me. 360; Andrews *v.* Stone, 10 Minn. 72; Southern Ex. Co. *v.* Brown, 67 Miss. 260. *Contra* in Texas: Galveston, H. & S. A. R.R. Co. *v.* Le Gierse, 51 Tex. 189; Zeliff *v.* Jennings, 61 Tex. 458; International & G. N. Ry. Co. *v.* Smith, 62 Tex. 252.

[f] Johnson *v.* Chicago, R. I. & P. Ry. Co., 51 Ia. 25; Jones *v.* Marshall, 56 Ia. 739.

[g] Bell *v.* Norris, 79 Ky. 48.

[h] Starkweather *v.* Quigley, 7 Hun 26.

[k] 36 Mich. 246.

pass was involuntary, and under a *bona fide* claim of right, might be given under the general issue. Cooley, J., said: "It was held, in Delevan *v.* Bates,(a) that whatever, in an action of tort, would go in mitigation of damages might be given in evidence under the general issue."

§ 1264. Interest.—Interest on a liquidated demand must be specially claimed, not on an unliquidated demand.(b)

§ 1265. Special damages—Actions for injury to real estate. —* In New York, in an action on the case, in which the plaintiff declared against the defendant for placing a quantity of lime, sand, and other building material opposite to his store, so that the free passage to it was interrupted, and the dust and dirt of the materials blew into his store and damaged his goods, it was held, that proof that customers were prevented from frequenting the store, and that a tenant who occupied it left it in consequence of the nuisance, whereby it remained empty, was inadmissible, because not alleged in the declaration as special damages. "Where the damages," said the Supreme Court, "actually sustained do not necessarily arise from the act complained of, and consequently are not implied by law, in order to prevent surprise to the defendant, the plaintiff must state in his declaration the particular damage which he has sustained, or he will not be permitted to give evidence of it upon the trial. . . . . There is no claim for damages in the declaration for the loss of customers. . . . . The loss of the tenant and the consequent loss of the rent of the store, ought to have been specially alleged, in order to entitle the plaintiff to have proved them as damages."[1]

[1] Squier *v.* Gould, 14 Wend. 159, 160.

(a) 1 Mich. 97; *acc.* Allis *v.* Nanson, 41 Ind. 154.
(b) Shepard *v.* Pratt, 16 Kas. 209.

So, in a later case in the same State, in an action of trespass on the case, the declaration alleged that the defendant, in consideration of the sale by the plaintiff to him of certain premises in the city of New York, covenanted that he would erect on them a brick dwelling-house, and would not erect on them any building to be occupied in any manner that would be a nuisance to the vicinity of the premises. The declaration then proceeded to aver that the defendant had not erected a brick dwelling-house, but had permitted a bake-house to be erected on the premises, and suffered it to be occupied in a manner that was a nuisance to the vicinity of the premises. There was no allegation of special damage, but the declaration concluded generally, to the damage of the plaintiff $6,000. On the trial the plaintiff's counsel offered to prove actual damage sustained by him in the depreciation of the value of premises owned by him, adjacent to the lot in question, occasioned by the erection of the bake-house. But the evidence was excluded on the ground of the want of any allegation of special damage in the declaration; and the judge who tried the cause held that the plaintiff could only recover nominal damages. By consent, a nonsuit was ordered, and on motion to set this aside the Supreme Court held the decision right. "Suppose," said Cady, J., "the bake-house has been so occupied as that it has been a nuisance. How has it damnified the plaintiff? The declaration does not show that he has been annoyed by the heat and smoke issuing from the bake-house, or that he has any property which has been lessened in value by the bake-house."[1] **

In the following cases the damages are special, and must be alleged: For loss of rents in actions for injury

[1] Bogert *v.* Burkhalter, 2 Barb. 525.

to real estate.(a) So, in an action for throwing water back upon the plaintiff's mill.(b) So, also, in an action for polluting the water of a stream; (c) in this case it was also held that the cost of boiling and skimming the water must also be specially alleged in order to be proved. But in Jutte *v.* Hughes,(d) where the plaintiff's premises were injured by the defendant's failure to keep his privies and drains in repair, it was held that loss of rent need not be alleged as special damage. So for profits of a mill lost by the obstruction of a water-course.(e) Damage to plaintiff's house from sparks and the smoking of paper; and the damages for the additional care required for children, in an action for laying a railroad along a street in front of the plaintiff's house.(f) On the other hand, no allegation is required, in an action of trespass *quare clausum*, to recover damage to a fence, by breaking which the defendant entered the land.(g) And the damage from the stoppage of the plaintiff's mill is an injurious consequence, which he may recover in an action of trespass for the destruction of his mill-dam, without specially averring it in the declaration.(h)

§ 1266. **For breach of contract.**—No allegation of special damage is necessary for loss of profit which would have been the direct result of work done at the contract price, and which is prevented by the defendant's wrongful act.(k) So in an action of covenant for breach of

(a) Adams *v.* Barry, 10 Gray 361; Parker *v.* Lowell, 11 Gray 353.
(b) Plimpton *v.* Gardiner, 64 Me. 360.
(c) Potter *v.* Froment, 47 Cal. 165.
(d) 67 N. Y. 267.
(e) Taylor *v.* Dustin, 43 N. H. 493; Crawford *v.* Parsons, 63 N. H. 438.
(f) Spencer *v.* St. Paul & S. C. Ry. Co., 21 Minn. 362.
(g) Clark *v.* Boardman, 42 Vt. 667.
(h) Spigelmoyer *v.* Walter, 3 W. & S. 540.
(k) Burrell *v.* New York & S. S.S. Co., 14 Mich. 34.

contract in not building a house, in payment of which the plaintiff was to have conveyed certain premises, no statement of special damages is necessary to entitle the plaintiff to give evidence of the difference in value between the house and the premises which constitutes the measure of damages.[a] In an action for breach of contract to give a lease, damages for loss of business [b] and for the expense of removal [c] have been held recoverable without special allegation. But in an action for breach of contract to furnish doors, the plaintiff, a master builder, cannot recover damages on account of the idleness of his workmen, caused by not having the doors, without special allegation.[d] In an action for breach of promise of marriage, no allegation of special damage is necessary for loss of time and expenses incurred in preparation for marriage,[e] but an allegation is necessary for loss of health [f] and for seduction.[g]

Where damages beyond legal interest for non-payment of a note at maturity are allowed by law, as a penalty, they cannot be recovered unless specially averred.[h] Counsel fees in action on attachment bond must be claimed as special damages. It may be that no counsel were necessary, and none were employed.[k] So on injunction bond.[l] No allegation is necessary to recover special damages for loss of sheep by disease communicated by other sheep warranted by the defendant; the

[a] Laraway *v.* Perkins, 10 N. Y. 371.
[b] Ward *v.* Smith, 11 Price 19.
[c] Driggs *v.* Dwight, 17 Wend. 71.
[d] Myer *v.* Davies, 17 Ill. App. 228.
[e] Smith *v.* Sherman, 4 Cush. 408.
[f] Bedell *v.* Powell, 13 Barb. 183.
[g] Cates *v.* McKinney, 48 Ind. 562; Leavitt *v.* Cutler, 37 Wis. 46.
[h] Wilson *v.* Dean, 10 Ia. 432.
[k] Dothard *v.* Sheid, 69 Ala. 135.
[l] Washington *v.* Timberlake, 74 Ala. 259.

plaintiff need not allege that the sheep so warranted were to be placed with the others.(a)

§ 1267. **Against carriers.**—In an action for injuries sustained by the plaintiff from the neglect of the defendant (a carrier of passengers by steamers) to furnish proper accommodations and supplies, it was held that, under an allegation of facts whereby the plaintiff was "subjected to great inconvenience and injury," proof might be introduced tending to prove the plaintiff's illness, and the negligence of the defendant causing such illness, this not being considered by the court to be special damage.(b)

§ 1268. **For injury to personal property.**—In the Queen's Bench, in an action on the case for an excessive distress, it was held, that no mention being made in the declaration of the *sale*, either for damage or by way of substantive complaint, the plaintiff could only recover damages in respect to the detention of the property, and not for the sale.[1] But where in an action in the nature of a trespass for the wrongful seizure of goods, which was the gist of the action, although the form of the plaintiff's complaint was limited to certain heads of special damage which were not proved, but it appeared that the taking was wrongful, the plaintiff was held, by the judicial committee of the Privy Council, entitled not only to nominal damages, but to such substantial damage as the jury thought adequate.(c) In an action of trespass *de bonis asportatis*, a special allegation of damage has been required for the expense of recovering the property.(d) In ac-

[1] Thompson *v.* Wood, 4 Q. B. 493.

(a) Packard *v.* Slack, 32 Vt. 9.
(b) Roberts *v.* Graham, 6 Wall. 578.
(c) Doss *v.* Doss, 14 L. T. R. [N. S.] 646.
(d) Gray *v.* Bullard, 22 Minn. 278.

tions of trover or replevin and of trespass for the destruction of property, all damages beyond the value of the property, if recoverable at all, must be specially alleged.(a) So for damages beyond the intrinsic value of a book destroyed by the defendant, on the ground that it contained a subscription list procured at large expense.(b) So in an action for the loss of an animal through negligence, damages beyond its value, such as money properly expended in efforts to cure it.(c)

In Indiana, in an action of trespass for killing a mare, damages for nursing and feeding two colts she had been suckling, and for care and attention of the mare's wound, not having been alleged, were held not recoverable.(d) Where an action is brought for taking property from the owner's possession, no damages can be recovered without special allegation for an injury received by the owner in an attempt to defend his possession.(e) Damages for loss of use of property detained may be recovered without special allegation.(f)

§ 1269. **For loss of business.**—For loss of business, in the sense of loss of time, no allegation is necessary; but for a loss caused to the plaintiff's particular business by the defendant's act a special allegation is required.(g) Upon a general allegation of loss of business the plaintiff

(a) Stevenson *v.* Smith, 28 Cal. 102; Brink *v.* Freoff, 44 Mich. 69; Burrage *v.* Melson, 48 Miss. 237; Schofield *v.* Ferrers, 46 Pa. 438; Park *v.* McDaniels, 37 Vt. 594; Domville *v.* Keevan, Stev. Dig. (N. B.) 434 (*semble, contra*, Firth *v.* Fitzgerald, Ibid. 432).

(b) Nunan *v.* San Francisco, 38 Cal. 689.

(c) Patten *v.* Libbey, 32 Me. 378.

(d) Teagarden *v.* Hetfield, 11 Ind. 522.

(e) Plumb *v.* Ives, 39 Conn. 120.

(f) Woodruff *v.* Cook, 25 Barb. 505; *contra*, Adams *v.* Gardner, 78 Ill. 568.

(g) Taylor *v.* Monroe, 43 Conn. 36; Tomlinson *v.* Derby, 43 Conn. 562; Chicago *v.* O'Brennan, 65 Ill. 160.

cannot recover for the loss of a particular business venture or engagement.[a] Nor under such an allegation can a farmer recover damages for the loss of his hay crop.[b] So upon a general allegation of loss of market, the plaintiff cannot show the loss of a particular contract of sale.[c]

§ 1270. **For personal injury.**—No allegation is necessary in an action to recover for personal injury, for bodily pain,[d] nor, in some jurisdictions, for mental suffering.[e] In an action for seduction mental suffering is a basis for recovery without special allegation.[f] In an action for personal injuries, it is held, in Massachusetts, that proof of damages from the interruption of the plaintiff's occupation, and deprivation of his accustomed means of earning support, is inadmissible unless such damages are specially alleged.[g] In Tomlinson *v.* Derby [h] the plaintiff was injured through a defect in the highway. The complaint alleged that the plaintiff was thereby "prevented from attending to his ordinary business." It was held, that he could not show that he was earning $100 a month in carting and sawing timber. Loomis, J., said:

"Special damage is that which the law does not necessarily imply that the plaintiff has sustained from the act complained

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[a] Pollock *v.* Gantt, 69 Ala. 373; Chicago W. D. Ry. Co. *v.* Klauber, 9 Ill. App. 613.

[b] Heiser *v.* Loomis, 47 Mich. 16.

[c] Rowe *v.* Titus, 1 All. (N. B.) 326.

[d] Curtis *v.* Rochester & S. R.R. Co., 18 N. Y. 534; Swarthout *v.* New Jersey S. B. Co., 46 Barb. 222.

[e] Central R.R. & B. Co. *v.* Lanier, 83 Ga. 587; 10 S. E. Rep. 279; Wright *v.* Compton, 53 Ind. 337; Gronan *v.* Kukkuck, 59 Ia. 18; Brown *v.* Hannibal & S. J. Ry. Co., 99 Mo. 310.

[f] Phillips *v.* Hoyle, 4 Gray 568.

[g] Baldwin *v.* Western R.R. Co., 4 Gray 333; *contra*, Potter *v.* Metropolitan Ry. Co., 28 L. T. R. [N. S.] 735.

[h] 43 Conn. 562.

of. . . . . It would seem, however, that when the consequences of an injury are peculiar to the circumstances and condition of the injured party, the law could not imply the damage simply from the act causing the injury. If it be true that the law implies a loss of time from the act complained of, it does not seem quite fair and just, when the sole object of the rule that requires special damage to be averred is to advise the defendant of the claim, to carry the implication so far as to imply also all the special consequences of such loss of time, when such consequences must depend on the peculiar circumstances of the plaintiff at the time of and previous to the injury, as that he was actually engaged in some special business which was at the time yielding a pecuniary profit."

In Taylor *v.* Monroe,[a] under a similar allegation, it was held, that the plaintiff could not show that she was employed as a button-maker, and what wages she earned. Loomis, J., said :

"As the business is not stated, nor any earnings or loss of earnings mentioned, the allegation referred to can only be construed as intended to characterize the injury, and indicate its extent and permanence in a general way, which amounts simply to a claim for general damages, and lays no foundation at all for proof of special damages. The evidence referred to was not intended simply to show the effect and extent of the injury, but to enhance the damages, by showing the loss of earnings in a special employment, requiring some special skill and training. These damages, therefore, were not the necessary result of the acts set out in the declaration, and could not be implied by law ; but they were special damages, which, in order to prevent a surprise upon the defendant, must be particularly specified in the declaration, or the plaintiff will not be permitted to give evidence of them at the trial."

In an action by an unmarried woman against a carrier for personal injury from his negligence, her diminished chances of marriage must be specially alleged to entitle her to an enhancement of the damages on that ground.[b]

[a] 43 Conn. 36. 46.

[b] Hunter *v.* Stewart, 47 Me. 419.

In Missouri it has been held that no recovery can be had for medical expenses in an action for assault and battery unless specially alleged,[a] but on general principles this seems doubtful. In an action for false imprisonment, damages from the bad condition of the jail are special, and can only be proved when alleged.[b] So sickness caused by the imprisonment must be specially alleged.[c]

§ 1271. **For other torts.**—In Alabama, it has been held, that in an action brought by a firm for a malicious prosecution, proof of special damage arising from loss of reputation, credit, or business, cannot be given unless it is specially averred in the declaration.[1] And the principle has been recognized in South Carolina[2] and Pennsylvania.[d] For slander of the plaintiff in either a public or private official capacity no allegation of special damage is necessary ;[e] but special damage must be alleged for injury to an author from the disparagement of a copyrighted work.[f] In an action for slander for words spoken of the plaintiff in his trade or business, with a general allegation of loss of business, it is competent for the plaintiff to prove, and the jury to assess, damages for a general loss or decrease of trade, although the declaration alleges loss of particular customers as special damage, which is not proved.[g] Only nominal damages can be recovered against a sheriff for not executing a deed on a par-

[1] Donnell *v.* Jones, 13 Ala. 490. [2] Rowand *v.* Bellinger, 3 Strobh. 373.

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[a] O'Leary *v.* Rowan, 31 Mo. 117.

[b] Johnson *v.* Von Kettler, 84 Ill. 315.

[c] Lowden *v.* Goodrick, Peake's Cas. 46 ; Pettit *v.* Addington, Peake's Cas. 62 ; Atchison, T. & S. F. R.R. Co. *v.* Rice, 36 Kas. 593.

[d] Stanfield *v.* Phillips, 78 Pa. 73.

[e] Foulger *v.* Newcomb, L. R. 2 Ex. 327.

[f] Swan *v.* Tappan, 5 Cush. 104.

[g] Evans *v.* Harries, 1 H. & N. 251.

tition sale, uuless special damages are alleged.(a) An allegation is necessary for recovery of the expenses occasioned by the fraudulent imitation of trade-marks.(b)

Practice.

§ 1272. Damages upon demurrer overruled.—When upon a demurrer judgment in given for the plaintiff, damages are to be assessed upon testimony; as has been seen, the amount of damages claimed is not to be allowed without proof. The defendant has a right to be heard on the question of damages,(c) and may reduce them to a nominal amount.(d)

* Where there is a demurrer to evidence and a joinder, the court may have the damages assessed by the jury conditionally, or they may discharge the jury, leaving the damages to be assessed by another jury, should the demurrer be overruled.[1] (e) ** If a demurrer to a declaration in a suit by drawer against acceptor be overruled, the court may, in Indiana, assess the damages so far as the amount due on the bill is concerned; but as to the costs of the protest, if chargeable at all, there must be a jury.[2] So upon any undisputed document the court may assess damages without a jury;(f) but where a doubtful question of fact is involved, like interest on a foreign judgment, a jury must be called in.(g) On a *venire tam quam*, to try

[1] Bull N. P. 314; 2 Tidd's Pr. 786; Andrews *v.* Hammond, 8 Blackf. 540.

[2] Phipps *v.* Addison, 7 Blackf. 375. In the same State, in debt on a sheriff's bond upon the execution of a writ of inquiry, after a demurrer to the replication assigning breaches has been overruled, the *quantum* of the relator's damages is the only subject of inquiry. Clark *v.* The State, 7 Blackf. 570.

(a) Lusk *v.* Briscoe, 65 Mo. 555.
(b) Dixon *v.* Fawcus, 3 L. T. R. [N. S.] 693.
(c) Hanley *v.* Sutherland, 74 Me. 212.
(d) Crogan *v.* Schiele, 53 Conn. 186.
(e) *Acc.* Hanover F. I. Co. *v.* Lewis, 23 Fla. 193.
(f) Harrington *v.* Witherow, 2 Blackf. 37.
(g) Evans *v.* Irvin, 1 Port. 390.

an issue as to one count, and assess contingent damages on demurrer to others, if the plaintiff be nonsuited as to the issue, he cannot proceed to assess contingent damages on the counts demurred to.[1] When a declaration in assumpsit contains a common count, after judgment for the plaintiff on demurrer, a writ of inquiry should be awarded to ascertain the damages.([a]) In Connecticut, however, it is said that "an inquest is merely to inform the conscience of the court," and may therefore be dispensed with; and the practice in that State, when a demurrer by the defendant is overruled, is for the court to assess damages in all cases.([b]) In Maine the plaintiff has the option of demanding a jury.([c])

§ 1273. **Upon plea in abatement.**—Where issue on a plea in abatement is found for the plaintiff, the judgment against the defendant is final, and the same jury should assess the damages. If they fail, however, to do so, under the practice in Kentucky, a jury to inquire of damages may be called, instead of ordering a *venire de novo*.([d])

§ 1274. **Upon plea to the damage.**—* There has been much discussion how far a plea can be put in to the damage only; and the reasonable rule appears to be that such a plea is bad, unless the damage is so essentially the cause of action that without it the suit could not be maintained.[2] ([e]) ** So where the defendant rightfully entered the plaintiff's close, but did unnecessary damage in carry-

[1] Packard *v.* Hill, 7 Cow. 434.

[2] Robinson *v.* Marchant, 7 Q. B. 918; Wilby *v.* Elston, 8 C. B. 142.

([a]) Stanton *v.* Henderson, 1 Ind. 69.

([b]) Havens *v.* Hartford & N. H. R.R. Co., 28 Conn. 69, 91.

([c]) Hanley *v.* Sutherland, 74 Me. 212.

([d]) Weathers *v.* Mudd, 12 B. Mon. 112.

([e]) Reindel *v.* Schell, 4 Jur. (N. S.) 310; 27 L. J. (C. P.) 146; Hopple *v.* Higbee, 23 N. J. L. 342; Saltus *v.* Kip, 2 Abb. Pr. 382.

ing away goods, it was held that a plea denying unnecessary damage was an issuable allegation.[a]

§ 1275. **Upon default.**—A judgment by default is an admission of the plaintiff's right to recover damages, but not as to the amount of damages; and upon a writ of inquiry, the defendant has a right to cross-examine the plaintiff's witnesses,[b] and the plaintiff has the right to open and close.[c] The plaintiff, on default, must prove his damages, or he can recover nominal damages only.[d] So where, in an action for trespass, the plaintiff took judgment by default, but gave no evidence of circumstances of aggravation, it was held that although these were alleged in the pleadings, they were not admitted by the default, and exemplary damages could not be given.[e] So in an action for injury to property through negligence, it was held that, upon an assessment of damages after default, the defendant could reduce the amount to nominal damages by showing that there was no negligence on his part.[f] But the jury cannot, after a default, find for the defendant;[g] they must find at least one mill as damages.[h] The court may, as in case of demurrer overruled, assess damages where the amount is certain; but the value of foreign money must be found by a

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[a] Carpenter *v.* Barber, 44 Vt. 441.

[b] Thompson *v.* Haislip, 14 Ark. 220; Mizell *v.* McDonald, 25 Ark. 38; Russ *v.* Gilbert, 19 Fla. 54; Chicago & R. I. R.R. Co. *v.* Ward, 16 Ill. 522.

[c] Wausau Boom Co. *v.* Dunbar, 75 Wis. 133.

[d] Daniel *v.* Judy, 14 B. Mon. 393; Willson *v.* Willson, 25 N. H. 229; Connoss *v.* Meir, 2 E. D. Smith 314; Hackett *v.* Richards, 3 E. D. Smith 13.

[e] Chicago & I. R.R. Co. *v.* Baker, 73 Ill. 316.

[f] Batchelder *v.* Bartholomew, 44 Conn. 494.

[g] Ellis *v.* State, 2 Ind. 262.

[h] Frazier *v.* Lomax, 1 D. C. (1 Cr. C. C.) 328.

jury,(a) and so in any case where questions of fact are involved.(b)

§ 1276. **Entire or several damages—Joinder of good and bad counts.**—* We have already said, that an important question may arise as to the assessment of entire or several damages. The jury may assess entire or distinct damages on each of the counts, when separate injuries have been proved. If distinct damages be assessed, judgment may be given on either of the counts; but if the jury find entire damages on all the counts, the judgment must be entire; and in this case, if one of the counts be insufficient, judgment will be arrested, or a writ of error be sustainable.[1] This may be where a good count is joined to a bad count; or where a bad assignment of breaches is joined with good; or where counts, though good in themselves, are improperly joined; or where a single count contains good and bad causes of action; and in those cases, if general damages be assessed, the practice has been different. If the verdict can be amended or applied to the good counts, this in some cases will be done.[2] And it has been said, in England, to be a settled rule that, "if the same count contains two demands or com-

[1] Chitty on Pleadings, vol. i, p. 447; Hambleton *v.* Veere, 2 Saunders 169; Eddowes *v.* Hopkins, 1 Doug. 376; Grant *v.* Astle, 2 Doug. 722. In this case Lord Mansfield, while he maintained the doctrine, declared the rule "inconvenient, ill-founded, and absurd," and called attention to the fact, that it did not apply to criminal prosecutions. But in O'Connell *v.* Reginam, 9 Jurist 25, the same principle was applied to an indictment for conspiracy. See, also, Cheetham *v.* Tillotson, 5 Johns. 430. The rule in civil actions has been affirmed in England. Eliot *v.* Allen, 1 C. B. 18. Where a breach gives no data to regulate the assessment of damages, though it negative the words of the condition of the bond, it is not well assigned. People *v.* Russell, 4 Wend. 570. But if so assigned that the plaintiff would be entitled to nominal damages only, it is not enough. Albany Dutch Church *v.* Vedder, 14 Wend. 165; Backus *v.* Richardson, 5 Johns. 476.

[2] Chitty on Pleadings, 448.

(a) Maunsell *v.* Massareene, 5 T. R. 87. In Lower Canada it seems that the court always assesses damages upon default. Vadeboncœur *v.* Mason, 5 Rev. Leg. 238.

(b) Maund *v.* Loeb, 87 Ala. 374.

plaints, for one of which the action lies, and not for the other, all the damages shall be referred to the good cause of action, although it would be otherwise if they were in separate counts."[1]

§ 1277. **Judgment when arrested.**—But if the verdict cannot be awarded or applied to the good counts, then the question is, whether the cause should be tried again, or the judgment entirely arrested. In some cases the judgment has been arrested;[2] and this still seems the practice in England, where counts, good in themselves, were improperly joined, which is in truth a misjoinder of causes of action;[3] but where good counts are joined with bad, the rule now seems to be that a new trial will be awarded.[4] Such seems the well-settled system in England; but in some parts of our Union, a more rational rule has been adopted. In Connecticut, the Supreme Court has said, that "if there be good and bad counts, or good and bad matter in the same count, the presumption, in our courts, is, that damages are given on the good parts."[5] So, in Ohio, if the declaration contains a good count among defective counts, the court on error will intend that the verdict was well taken on the good count, unless the record shows that it was rendered upon those that were defective.[6] Mr. Sergeant Williams, in his valuable notes to Saunders' Reports,[7] after collecting a great number of cases on this subject, observes that the

[1] Doe *d.* Lawrie *v.* Dyeball, 8 B. & C. 70; Kitchenman *v.* Skeel, 3 Ex. 49.

[2] Com. Dig. Damages, E. 5; Corner *v.* Shew, 4 M. & W. 163. Where the plaintiff declares upon a contract consisting of several parts, and assigns, among other breaches, one which from his own showing, could not have taken place before the action was brought, the court cannot intend that the damages, if assessed generally, were given only for that matter in the count which was actionable, and therefore will reverse the judgment. Gordon *v.* Kennedy, 2 Binn. 287; Lewis *v.* Witham, 2 Strange 1185.

[3] Johnson *v.* Mullin, 12 Ohio 10; Chisom *v.* School District, 19 Ohio 289.

[4] Kitchenman *v.* Skeel, 3 Ex. 49.

[5] Graves *v.* Waller, 19 Conn. 90. *Acc.* Leach *v.* Thomas, 2 M. & W. 427; Emblin *v.* Dartnell, 12 M. & W. 830.

[6] Hopkins *v.* Beedle, 1 Caines 347; Lyle *v.* Clason, 1 Caines 581.

[7] Note to Hambleton *v.* Veere, 2 Saund. 169, 171.

result of them all appears to be, that where it is expressly and positively averred in the declaration that the plaintiff has sustained damages for a cause arising subsequent to the commencement of his suit, or previous to his having any right of action, and the jury gives entire damages, the judgment will be arrested. But when the cause of action is properly laid, and the other matter comes in either under a *scilicet*, or is void, insensible, or impossible, and it therefore cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to judgment.[1] The better mode, of course, where any difficulty of this kind is apprehended, is to assess the damages severally on each count. In such case the judgment will be arrested only on the count that is bad.[2]

§ 1278. **Count bad in part.**—So, part of a count may be bad; and in such a case,[3] in an action of covenant for quiet enjoyment, the plaintiff had averred by way of special damages, after setting out an eviction, that he had lost divers large sums of money expended on and about improving the premises, it was insisted that, as part of the special damage did not fall within the covenant, and the jury had assessed general damages, the whole was erroneous. But Abbott, C. J., intimated that, the whole declaration consisting of one count, *after verdict* it was to be presumed that the judge, at the trial, directed the jury to confine their attention to that part of the special damage only which was relevant to the covenant broken. So, in New York, it has been held that where a count contains two separate and distinct allegations of damages, one actionable and the other not,

[1] Steele *v.* Western Inland L. N. Co., 2 Johns. 286.

[2] Hayter *v.* Moat, 2 M. & W. 56. In the case of Gregory *v.* The Duke of Brunswick, 7 Scott's N. R. 972, the jury having found a general verdict for the defendants, the court refused to award a *venire de novo* on the ground that they had not assessed damages on the issue at law.

[3] Campbell *v.* Lewis, 3 B. & Ald. 392.

no motion in arrest of judgment will be sustained; for the court will intend, after verdict, that the damages were only given for the actionable part of the declaration.[1] (a) ** So, in slander, if the words are all spoken at one time and all embraced in one count, and among them are any that will maintain the action, a verdict for the plaintiff will be good, since it will be intended that the damages are for the actionable words only, and that the others were alleged for aggravation. But if the action be for different words spoken at different times, and will lie for the one, but not for the other, a general verdict for entire damages will not be good.(b)

§ 1279. **Joint torts.**—* In regard to the verdict, the question of severance is important in another point of view. Where several persons are jointly charged in an action of tort, as of assault, battery, and false imprisonment, and they either plead jointly, or sever in their pleas, or one suffers judgment to go by default, if the jury assesses several damages, the verdict is wrong, and the judgment will be erroneous;[2] (c) for the trespass being jointly charged,

[1] Steele *v.* Western I. L. N. Co., 2 Johns. 286; Osborn's Case, 10 Coke 130; Lloyd *v.* Morris, Willes R. 443; 5 Bac. Abr. 249.

[2] Salmon *v.* Smith, 1 Saunders 207, note 2; Hill *v.* Goodchild, 5 Burr. 2790; Mitchell *v.* Milbank, 6 T. R. 199; Brown *v.* Allen, 4 Esp. 158; Bohun *v.* Taylor, 6 Cowen 313; Wakely *v.* Hart, 6 Bin. 316, 319; Bostwick *v.* Lewis, 1 Day 33; Crawford *v.* Morris, 5 Gratt. 90; Halsey *v.* Woodruff, 9 Pick. 555; Beal *v.* Finch, 11 N. Y. 128.

(a) This rule was also followed by the New York Supreme Court. Edwards *v.* Reynolds, Hill & D. Supp. 53. But in the New York Superior Court it has been held, that where damages have been assessed by the jury in one sum upon two items of claim, on one of which plaintiff was entitled to recover, while on the other he was not, and they cannot be severed and apportioned by the appellate court, there must be a new trial, unless the plaintiff will remit the damages entirely. Sherry *v.* Frecking, 4 Duer 452.

(b) Empson *v* Griffin, 11 A. & E 186.

(c) Yeazel *v.* Alexander, 58 Ill. 254. In Brison *v.* Dougherty, 3 Baxter 93, it was held that the plaintiff could have several judgments against joint trespassers, but only one satisfaction.

and the jury finding them jointly guilty, the damages cannot be separated, and consequently the verdict should be for the amount which the most culpable ought to pay.** In many cases of joint trespass and several damages given, the plaintiff is permitted to enter one joint judgment against all, assuming the largest sum assessed against any one as the damages against all, *de melioribus damnis*.[1] So where a joint tort had been committed, and the referee found that the plaintiffs had been damaged by one of the defendants to the amount of $600, and by the other to the amount of $150, it was held by the Superior Court of New York that the judgment was rightly entered against both in the larger amount.(a) Or the error may be cured by entering a *nolle prosequi* against all but one, and taking judgment against him only.(b)

§ 1280. **Several torts by different defendants in same suit.**—* But, on the other hand, if the charge is several, the rule is the reverse. So, in an action against divers persons found guilty of several takings or offenses, damages ought to be assessed against them severally; as in trespass for battery and goods, if one be found guilty for the battery, and the other for the goods taken.

So, if against three defendants, one demurs, another makes *default*, and a third *joins* issue; on the trial sev-

[1] Halsey *v.* Woodruff, 9 Pick. 555; Fuller *v.* Chamberlain, 11 Met. 503.

(a) O'Shea *v.* Kirker, 4 Bosw. 120; *acc.* Hair *v.* Little, 28 Ala. 236; Clark *v.* Bales, 15 Ark. 452; Bell *v.* Morrison, 27 Miss. 68. But in Clissold *v.* Machell, 26 Up. Can. Q. B. 422, it was held that if judgment were entered against two defendants upon a verdict of this nature, it must be for the smaller amount.

(b) Conner *v.* Cockerill, 4 D. C. (4 Cr. C. C.) 3; Hardy *v.* Thomas, 23 Miss. 544; Warren *v.* Westrup, 44 Minn. 237; 46 N. W. Rep. 347; Holley *v.* Mix, 3 Wend. 350; Clissold *v.* Machell, 26 Up. Can. Q. B. 422.

eral damages shall be assessed against those who demur and make default.[1] **

§ 1281. **Award of arbitrators.**—* It has been held in England, that where a verdict is taken at Nisi Prius, subject to the award of an arbitrator, to whom all matters in difference are referred, he cannot award a greater sum than that for which the verdict was taken. But this does not apply to the action of debt.[2] **

§ 1282. **Costs.**—Costs are an incident to the judgment, and cannot be allowed by the jury as damages.([a]) And although if a jury ask what amount of damages will carry costs, there is no reason why the judge should not tell them, as it is a part of the law,([b]) yet their having given a verdict in ignorance that it will not carry costs, is no reason why it should be disturbed after it is recorded.([c]) And it is said that a verdict, the amount of which is adjusted by a jury for the purpose of giving or withholding costs, cannot be sustained.([d]) So where, in an action of trespass, the jury rendered a verdict in favor of the plaintiff for costs, it was held that such a verdict and the judgment thereon were nullities; that in legal effect this was a finding in favor of the defendant, and the law carried the costs in his favor against the plaintiff.([e])

§ 1283. **Obsolete judgment of "damage clear."**—* There was formerly, in England, a charge on the plaintiff's

[1] Com. Dig. Damages, E. 5; Chapman *v.* House, 2 Str. 1140. In New York, in an action against several, if one pleads to issue and another suffers judgment by default, damages must be assessed against both at the same time, by the jury who try the issue. Van Schaick *v.* Trotter, 6 Cow. 599.

[2] Bonner *v.* Charlton, 5 East 139; Annan *v.* Job, 10 Jurist 1083.

([a]) Shay *v.* Tuolumne Water Co., 6 Cal. 286.
([b]) Steketee *v.* Kimm, 48 Mich. 322.
([c]) Kilmore *v.* Abdoolah, 27 L. J. Ex. 307.
([d]) Russell *v.* Weneweser, 2 Ir. R. C. L. 427, 431.
([e]) Mangham *v.* Reed, 11 Ga. 137.

judgment called *damage clear*, which was a payment required to be made of twelve pence in the pound; but it seems to have been long since abolished; for, in an early case, it appears that the court thought it "hard that the plaintiffe should be stopt of his judgement till he had paid his damages cleere," and they resolved to amend it.[1] **

§ 1284. **Form of verdict.**—In an action to recover money, the jury should find for the plaintiff the amount of his debt as proved, and the damages separately; and the judgment should follow the verdict. Yet where the verdict and judgment give in an aggregate sum as damages, the amount of the debt and legal interest thereon from the time when due until the time of the verdict, if the total amount found by the verdict for damages does not exceed the principal and interest due or the sum laid as damages in the declaration, such verdict will not be held invalid, but will authorize and support a judgment for the sum in damages so found.(a) In South Carolina, where in debt on a bond, the jury, in finding for the plaintiff on the general issue, assess the damages (as, under the practice there, is proper), and allow the plaintiff only the principal sum due, but not the interest, to which he is entitled, his only remedy is by appeal. Judgment for the interest, *non obstante veredicto*, will not be allowed, nor can he collect it by marking it for collection on the *fi. fa.*(b)

§ 1285. **Damages as affecting jurisdiction.**—* An important question as to damages with reference to pleading is presented in the United States, in regard to the jurisdiction of those courts which are prohibited from taking

[1] Thorp's Case, March, 75.

(a) Young *v.* Chandler, 13 B. Mon. 252.
(b) Gourdin *v.* Read, 10 Rich. L. 217.

cognizance of any cases, unless a certain pecuniary amount is *in controversy*: as in regard to the Circuit Courts, which do not usually exercise their jurisdiction over cases involving less than five hundred dollars; and the Supreme Court of the United States, the appellate jurisdiction of which, in like manner, commences at the sum of five (formerly two) thousand dollars. And it has been frequently decided "that the damages claimed in the writ and declaration are the sum in controversy." Even if the plaintiff recover less than five hundred dollars, it cannot affect the jurisdiction of the court if a greater sum be claimed in his writ.[1] But on application to remove a suit from the State court, it has been intimated that the amount in the declaration is not conclusive, and that the plaintiff's affidavit may be received to controvert it.[2]

On a writ of error, though the verdict in the Circuit Court was for less than two thousand dollars, but more than that sum was claimed in the declaration, if the plaintiff brought error, the Supreme Court had jurisdiction (before the limit was changed); for the judgment might be reversed, and the whole amount claimed recovered.[3] But this is not so if the writ of error is brought by the defendant.[4] In such case the amount in controversy is to be decided by the sum in controversy at the time of the judgment, and not by any subsequent additions thereto, such as interest. The court cannot look beyond the time of the judgment, in order to ascertain whether a writ of error lies or not.[5]

[1] Gordon *v.* Longest, 16 Pet. 97, 104.

[2] People *v.* Judges of N. Y. C. P., 2 Denio 197.

[3] Gordon *v.* Ogden, 3 Pet. 33.

[4] Smith *v.* Honey, 3 Pet. 469. See, also, Wilson *v.* Daniel, 3 Dall. 401; United States *v.* M'Dowell, 4 Cranch 316; Course *v.* Stead, 4 Dall. 22; Brown *v.* Barry, 3 Dall. 365; United States *v.* The Union, 4 Cranch 216; Peyton *v.* Robertson, 9 Wheat. 527; Ritchie *v.* Mauro, 2 Pet. 243; Scott *v.* Lunt, 6 Pet. 349; United States *v.* Macdaniel, 7 Pet. 1.

[5] Knapp *v.* Banks, 2 How. 73. See, also, Wilson *v.* Sandford, 10 How. 99.

And where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the recognized practice of the courts of the United States has been to allow the value to be given in evidence.[1] **

In the State courts, in actions of tort, the damages claimed usually determine the jurisdiction as to amount.(a) But under the Indiana Code, the damages laid in the conclusion of the complaint do not enlarge the claim of the plaintiff so as to defeat the jurisdiction of a court limited in jurisdiction to a specified amount, if it appear by the statement of the plaintiff's cause of action that he cannot be entitled to recover as much as the limit within which the jurisdiction is confined.(b) In an action of contract it was held in Maryland that the amount recovered, not that laid in the declaration, determines the jurisdiction, and if in a court which has no jurisdiction of claims under a certain amount a verdict is returned for less than that amount, the court has no jurisdiction to proceed further with the case.(c)

§ 1286. **Right to begin.**—* If the rules of pleading are correctly followed, the only remaining questions in regard to damages are those which come properly under the head of practice. The most important of these is that which presents itself at the trial of the cause in regard to the right to begin, as it is called; or, in other words, in what cases does the necessity of proving damages give the plaintiff a right to open and close the cause, where the affirmative of the issue is with the

[1] *Ex parte* Bradstreet, 7 Pet. 634; United States *v.* The Union, 4 Cranch 216; Course *v.* Stead, 4 Dall. 22.

(a) Aulick *v.* Adams, 12 B. Mon. 104.
(b) Collins *v.* Shaw, 8 Ind. 516.
(c) Rohr *v.* Anderson, 51 Md. 205, 218.

defendant. The importance of this subject has been clearly stated by a judge of great experience: "It unhappily still remains of great importance to the administration of justice by a jury, that the right to begin should be correctly adjudicated on; for all who are conversant with those trials at Nisi Prius, in which the address of counsel may materially affect the result, well know that the issue often ultimately depends on the decision of the question, which party has a right to begin."[1]

In England, it has at length been settled by a rule of all the judges, that the plaintiff shall begin in all actions for personal injuries, libel, and slander though the general issue may not be pleaded, and the affirmative be on the defendant in actions of contract;[2] however, the subject is still involved in uncertainty. An effort has been made to make the right depend on whether the plaintiff goes for substantial relief or for nominal damages; but the point does not appear to have been yet authoritatively settled.[3]

"In this country," says Mr. Greenleaf, in his very valuable work on Evidence, "it is generally deemed a matter of discretion, to be ordered by the judge at the trial, as he may think most conducive to the administration of justice; but the weight of authority, as well as the analogies of the law, seem to be in favor of giving the opening and closing of the cause to the plaintiff, wherever the damages are in dispute, unliquidated, and to be settled by the jury upon such evidence as may be adduced, and not by computation alone."[4] This lan-

[1] Pollock, C. B., in Ashby *v.* Bates, 15 M. & W. 589, 594, where a new trial was ordered because of an erroneous ruling at Nisi Prius as to the right to begin. See, also, Booth *v.* Millns, 15 M. & W. 669.

[2] Greenleaf on Evidence, § 76, 3d ed. 149; Mercer *v.* Whall, 9 Jur. 576, and 5 Q. B. 447.

[3] Chapman *v.* Rawson, 8 Q. B. 673; Cannam *v.* Farmer, 2 Car. & Kir. 747. In the Exchequer, the crown has the right to a general reply in all cases where the crown has an interest. Marquis of Chandos *v.* Comm'rs of Inland Revenue, 20 L. J. Exch. 269.

[4] 1 Greenleaf on Evidence, 14th ed., § 76, p. 107, where cases will be found.

guage seems to ascribe a greater discretion to the judge trying the cause, and to open the door to greater laxity than is in fact allowed. In Massachusetts, it has been said, citing with approbation the language of Lord Denman, in Mercer *v.* Whall:[1] "Wherever, from the state of the record at Nisi Prius, there is anything to be proved by the plaintiff, whether as to the facts necessary for his obtaining a verdict, or as to the amount of damages, the plaintiff is *entitled* to begin. But where the *onus probandi* lies in the first instance on the defendant, he is entitled to begin."[2] So, in the same State, when in trespass the defendant pleads soil and freehold in himself, without any other plea, and issue is joined thereon, the right of opening and closing the argument before the jury belongs to the defendant.[3] So, in the same State, on the hearing before a jury to reassess damages for taking land for a railroad, the party claiming damages has the right to open and close, and a contrary ruling at the trial was held erroneous.[4]**

[1] 5 Q. B. 447.
[2] Conn. River R.R. Co. *v.* Clapp, 1 Cush. 559, 563.
[3] Davis *v.* Mason, 4 Pick. 156.
[4] Conn. River R.R. Co. *v.* Clapp, 1 Cush. 559.

CHAPTER XLIII.

EVIDENCE.

§ 1287. Mode of proof.
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§ 1287. **Mode of proof.**—* We have now to consider the mode of proof by which claims to damage are substantiated. The rules which govern evidence as applied to fix the measure of relief, are neither numerous nor complex, but they deserve careful attention.

We have seen that in the early stages of the civil law, the plaintiff was allowed to fix the amount of the compensation to which he conceived himself entitled, subject only to the restraining hand of the *judex*. In the common law, independently of statutory innovation, the rule was carried to the other extreme; for, as a general principle, neither party to the record was allowed to give testimony in any branch of the case. But to this rule certain exceptions were introduced.

§ 1288. **Exceptions to common-law rule excluding testimony of party.**—The oath of the party was admitted by the common law, in respect of a lost deed or other paper, preparatory to the introduction of secondary evidence to prove its contents. So, too, in complaints under bastardy acts, the oath of the female was admitted to charge the defendant with the paternity of the offspring. So, again, the rule was relaxed in order to prove the amount of compensation to which a party was entitled; thus, the oath of the plaintiff was admitted in many States of the Union to prove the truth of entries in his books of goods delivered in small amounts or of daily labor performed, when the party, from his situation, has no evidence but the accounts kept by himself, and where, as a general thing, from the nature of the traffic or service, he could not have. So, too, where robberies or larcenies had been committed, and no evidence existed but that of the party robbed or plundered, he has been admitted as a witness to prove his loss; for it was said that in these cases the party injured should have an extraordinary remedy *in odium spoliatoris*. On this ground, in an action against the hundred under the English statute of Winton, the person robbed was admitted as a witness to prove his loss and the amount of it.[1] So, in Pennsylvania, in an action against the county for the destruction of property by a mob, the plaintiff was allowed to prove ownership and the value of wearing apparel destroyed,[2] but not the destruction of household furniture, because there the argument *ex necessitate* did not apply.[3] So, also, in equity, where a man ran away with a casket of jewels, the party injured was admitted as a witness.[4] So, too,

[1] Bul. N. P. 187; Porter *v.* Hundred of Regland, Peake's Add. Cases, 203; Snow *v.* Eastern R.R. Co., 12 Met. 44.

[2] The County *v.* Leidy, 10 Pa. 45. See, also, Clark *v.* Spense, 10 Watts 335; M'Gill *v.* Rowand, 3 Pa. 451.

[3] Ibid.

[4] East India Co. *v.* Evans, 1 Vern. 305.

when the defendant, a shipmaster, broke open and plundered the plaintiff's trunk, the latter was allowed to testify to the contents of the trunk.[1]

An effort was made in Pennsylvania to extend the principle of these exceptions to all cases of passengers by public conveyances, where there was no criminal nor even tortious act committed by the defendant beyond mere negligence; and it was said that in such cases the plaintiff might testify from necessity.[2] But in Massachusetts this was denied; the old principle was adhered to, and in a case of mere negligence it was decided that the plaintiff was not competent, even though he had no other testimony as to the amount of his loss.[3]

In New York, the admission of the plaintiff as a witness in these cases was sanctioned by statute; the general railroad act[4] of that State providing, where baggage was properly checked, that if not delivered on the production of the check, "the plaintiff may himself be a witness, in any suit brought by him, to prove the contents and value of said baggage."[5]**

§ 1289. **Abrogation of common-law rule.**—Before the abrogation of the common-law rule, the plaintiff himself, in actions against a common carrier or innkeeper, to recover for a trunk, etc., lost, was frequently allowed, as we have seen, to prove its contents.([a]) But in Garvey *v.* Camden & A. R.R. Co.([b]) it was held that the rule of

[1] Herman *v.* Drinkwater, 1 Me. 27.
[2] Whitesell *v.* Crane, 8 W. & S. 369.
[3] Snow *v.* Eastern R.R. Co., 12 Met. 44.
[4] Laws of 1850, c. 140, § 37.
[5] As to how far this provision was applicable to all the railroads existing in the State, see Marsh *v.* New York & Erie R.R. Co., 14 Barb. 364; Milliman *v.* Oswego & Syracuse R.R. Co., 10 Barb. 87.

([a]) Doyle *v.* Kiser, 6 Ind. 242; Taylor *v.* Monnot, 1 Abb. Pr. 325; S. C. 4 Duer 116; Mad River & Lake Erie Railroad Company *v.* Fulton, 20 Ohio 318.

([b]) 4 Abb. Pr. 171.

evidence which allowed the plaintiff, in an action against a common carrier, to recover for a lost trunk, etc., to prove the value of the contents by his own oath, was confined to cases in which fraud or wrong is proved upon the defendant, and had no application to cases of loss through negligence merely. And the jury were not bound by the evidence of one of the parties to the suit in estimating the damages, though there was no other evidence before them to fix the amount.(a) It is one of the natural concomitants of illness and of physical injuries for the sick or injured persons to complain of pain and distress. And evidence of such complaints, in connection with other proofs of injury received, was held admissible from the necessity of the case, in an action for the injury sustained, to show its extent, etc. Such evidence did not fall within the rule which excluded declarations of a party in his own favor.(b)

The original rule of the common law has been now, however, so far changed, both in England and in this country, by statute, that the decisions cited in the preceding paragraphs have little importance. In England, New York, Connecticut, and probably all other States of the Union, the rule of the common law has been abrogated, and, with more or fewer exceptions, parties are permitted to testify in chief and to all facts pertinent to the case.

§ 1290. **Witness to testify to facts, not opinions.**—*Another general rule, which pervades all our law, is that the witness is to testify only to facts. He is to speak as to the facts which he has heard or seen. His opinion is not

(a) Bee Printing Co. *v.* Hichborn, 4 All. 63.

(b) Caldwell *v.* Murphy, 11 N. Y. 416; and see S. C. below, 1 Duer 233; also, to same effect, Bacon *v.* Charlton, 7 Cush. 581; McKeigue *v.* Janesville, 68 Wis. 50; King *v.* Oshkosh, 75 Wis. 517; S. C. 44 N. W. Rep. 745.

to be given;(a) for it is the opinion of the jury on the testimony which forms the verdict and decides the case. But to this rule, again, there are many important exceptions. So, pedigree is often proved by the hearsay of the family. So, handwriting is proved by the opinions of those familiar with the signature of the party. So, too, the witness has been allowed to state his opinion in cases of criminal conversation, to show the state of the affections of the parties.[1] And, on similar grounds, in cases of breach of promise of marriage. In an action of the latter description, the Supreme Court of New York said: "We do not see how the various facts upon which an opinion of the plaintiff's attachment must be grounded, are capable of specification, so as to leave it, like ordinary facts, as a matter of inference, to the jury. It is true, as a general rule, that witnesses are not allowed to give their opinions to a jury; but there are exceptions, and we think this one of them. There are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot specify. The opinions of witnesses on this subject must be derived from a series of instances, passing under their observation, which yet they never could detail to a jury."[2] So, too, evidence of this kind has been admitted in cases of insanity; but it has been pronounced by a very able judge, "the most unsatisfactory, and the least to be depended on."[3]** So it has been held proper to ask a contractor what the amount of his loss is and what the profit on the work would have been.(b)

[1] Trelawney *v.* Colman, 2 Starkie 191.

[2] M'Kee *v.* Nelson, 4 Cow. 355.

[3] Clark *v.* Fisher, 1 Paige 171.

(a) Montelius *v.* Atherton, 6 Col. 225; Blair *v.* The Milwaukee & P. du C. R.R. Co., 20 Wis. 262.

(b) Elizabethtown & P. R.R. Co. *v.* Pottinger, 10 Bush 185.

§ 1291. **Experts.**—* To the general rule that the witness' opinion cannot be received as to the amount or character of injury sustained, there are, however, some considerable exceptions. Of these, perhaps the most comprehensive and important is that which admits persons of science, or experts in any profession, to testify as to their opinion on a given state of facts relating to matters in regard to which their education gives them peculiar capacity for forming a correct judgment.[1]

So, in Massachusetts, on the trial of an action to recover damages for injury done to the plaintiff's garden and nursery by smoke, heat, and gas proceeding from the defendant's brick kiln, two gardeners who had much experience in raising and cultivating fruit trees, shrubs, and plants, and who had testified to the particulars of the plaintiff's injury, were allowed to give their opinion as to the amount of damage. And the court say: "It seems to us that it would be impracticable to dispense with this species of testimony, in many actions of trover for personal property, where no detail of facts could adequately inform the jury of the value of the articles. The opinion of a witness, as to the value of a horse, is much more satisfactory evidence than a detailed statement of his size, color, age, etc., to give the jury the requisite information, to enable them to assess damages for the conversion of such a horse."[2](a) So, in an action on a building contract, a mason may be asked how long, in his opinion, it would

[1] Folkes *v.* Chadd, 3 Doug. 157. [2] Vandine *v.* Burpee, 13 Met. 288.

(a) *Acc.* Nickley *v.* Thomas, 22 Barb. 652; Smith *v.* Hill, 22 Barb. 656; The Milwaukee & Mississippi Railroad Co. *v.* Eble, 4 Chand. (Wis.) 72. But in Dunlap *v.* Snyder, 17 Barb. 561, it was held that in an action for damages for killing a dog, the opinions of witnesses as to the value of the animal were not admissible. See, as to proper evidence of the value of a horse, Carr *v.* Moore, 41 N. H. 131.

take to dry the walls of a house so as to render it fit and safe for human habitation.[1] ** A physician may testify as to the probable effect of an injury on the future health of the injured party.([a])

But the testimony of experts must not be given at random, or on insufficient or inexact data. So, in an action against the defendants as carriers, for non-performance of a contract to carry live stock from several different places to Detroit, where the circuit judge had allowed a witness to be asked the general question, what, in his opinion, was the extra shrinkage in consequence of the delay at the several places where the cattle were loaded, and at Detroit, above what it would have been if they had gone on in the regular train, and had been unloaded on arrival, it was held, by the Supreme Court of Michigan, that, as the different portions of the stock had been on the cars without food or water for various lengths of time, they must have been quite differently affected by shrinkage, and the inquiry should have been as to each separately. The admission of the general question was erroneous.([b])

§ 1292. **Confined to matters of art and skill.**—* But this exception is generally strictly limited to the case of experts in matters of art and skill, and is not enlarged so as to admit opinion in ordinary cases, where the jury may be supposed competent to form their judgment from the statement of the facts. Nor where the opinion necessarily degenerates into mere conjecture. So, in an action for negligently injuring and sinking a canal-boat, a boatman who knew the boat in question previous to her being injured, and swore that he had raised sunken boats and

[1] Smith *v.* Gugerty, 4 Barb. 614.

([a]) Jones *v.* Utica & B. R. R.R. Co., 40 Hun 349.

([b]) Michigan So. & N. I. R.R. Co. *v.* McDonough, 21 Mich. 165.

repaired them, cannot testify as to his opinion of what the damages would be from the description of the situation of the boat by the witnesses.[1]

In an action on the case against a railroad company for injury to the person of a passenger through the negligence of the company, evidence of loss sustained by the plaintiff in his business in consequence of the injury received, is proper to aid the jury in estimating the plaintiff's damages; and for that purpose the nature of the plaintiff's business, its extent, and the importance of his personal oversight and superintendence in conducting it, may be shown; but the opinions of witnesses as to the amount of loss are inadmissible.[2] A party in the city of New York, whose property is destroyed by the order of the city officers to stop the spread of a conflagration, is entitled to an allowance to the full value of the property destroyed, without any deduction for the amount insured, and interest on it; but the opinion of bystanders, that the buildings destroyed would have been consumed by the fire if they had not been blown up, are inadmissible. It was, however, suggested that perhaps the opinion of firemen and others, having particular knowledge and experience with reference to fires, might be received.[3] ** Where, by the defendant's tort, the plaintiff's horse was caused to run away, it was held not to be proper to show by testimony the depreciation in value of the horse caused by his running away.([a])

§ 1293. **Opinions as to quantum of damages.**—* The general rule which requires a witness to speak to facts within his knowledge, is applied to the subject of compensation;

[1] Paige *v.* Hazard, 5 Hill 603.
[2] Lincoln *v.* Saratoga & S. R.R. Co., 23 Wend. 425.
[3] Mayor, etc., of N. Y. *v.* Pentz, 24 Wend. 668.

([a]) Van Wagoner *v.* New York Cement Co., 36 Hun 552.

the damage must be proved like any other fact in the cause, and no testimony amounting to mere opinion is competent.(a) ** So, in Louisiana, in a suit on a sequestration bond, the opinion of witnesses cannot form the basis of a verdict. They should testify to facts, and from those facts the jury should find the actual damages sustained.(b) * So, in New York, a witness cannot be allowed to give his opinion as to the amount of damages sustained by a party in consequence of a mill lying still.[1] So, the opinions of witnesses as to the amount of damages caused by the deprivation or withdrawal of water from a tavern, are inadmissible.[2] So, too, on ascertaining the injury caused by an alleged nuisance, a witness cannot give his opinion as to the amount of damages.[3] So, in an action for the breach of a covenant contained in a lease, that the defendant would not let any other mill site on the same stream, it was held not proper to admit witnesses to testify their opinion as to the amount of damage which the plaintiffs had sustained by the erection of the rival site, and a new trial was ordered.[4]

[1] Doolittle *v.* Eddy, 7 Barb. 75.
[2] Harger *v.* Edmonds, 4 Barb. 256; Giles *v.* O'Toole, 4 Barb. 261.
[3] Fish *v.* Dodge, 4 Denio 311.
[4] Norman *v.* Wells, 17 Wend. 137, 161; Fish *v.* Dodge, 4 Denio 311, 318.

(a) Montgomery & W. P. R.R. Co. *v.* Varner, 19 Ala. 185; Chandler *v.* Bush, 84 Ala. 102; St. Louis, I. M. & S. Ry. Co. *v.* Freeman, 36 Ark. 41; Little Rock, M. R. & T. Ry. Co. *v.* Haynes, 47 Ark. 497; Gilbert *v.* Cherry, 57 Ga. 128; Central R.R. Co. *v.* Senn, 73 Ga. 705; Ohio & M. R.R. Co. *v.* Nickless, 71 Ind. 271; Pittsburgh, C. & St. L. Ry. Co. *v.* Hixon, 79 Ind. 111; Hagaman *v.* Moore, 84 Ind. 496; Whitmore *v.* Bowman, 4 Greene (Ia.) 148; Sharon Town Co. *v.* Morris, 39 Kas. 377; Ottawa, O. C. & C. G. R.R. Co. *v.* Adolph, 41 Kas. 600; Wilcox *v.* Leake, 11 La. Ann. 178; Howell *v.* Medler, 41 Mich. 641; Fremont, E. & M. V. R.R. Co. *v.* Marley, 25 Neb. 138; Omaha *v.* Kramer, 25 Neb. 489; Morehouse *v.* Mathews, 2 N. Y. 514; Green *v.* Plank, 48 N. Y. 669; Cook *v.* Brockway, 21 Barb. 331; Cleveland & P. R.R. Co. *v.* Ball, 5 Oh. St. 568; Ferguson *v.* Tobey, 1 Wash. 275; *contra*, Razzo *v.* Varni, 81 Cal. 289.

(b) Bonner *v.* Copley, 15 La. Ann. 504.

The objection usually taken is that it usurps the province of the jury. It is for the jury to determine how much the property is damaged under the instructions of the court; and witnesses should always testify to facts. To answer the question how much a piece of property is "damaged" by a given injury, is a question which requires for an intelligent answer a knowledge of the rule of damages applicable in the particular case. For example, in eminent domain cases it cannot be answered without taking into consideration the question of benefits. The same property will be damaged in one amount if benefits are excluded, in another if included. Hence expert testimony as to "damage," if not absolutely excluded, should be subjected to the most rigid scrutiny.

This criticism would not apply, however, where the measure of damages is *the mere depreciation in value of property*. In that case a witness has without doubt the right to state the value before and after the injury; and as the depreciation is a mere matter of the subtraction of one of these values from the other, it involves no question of law. It is therefore held that where the amount of damages is merely the depreciation in value of property, a witness is not prevented from giving his opinion of the depreciation merely because the quantum of damages happens to coincide with it.[a] As a general rule, the opinion of a witness as to the amount of damages which a landholder will sustain by reason of the construction and use of a railroad, is not evidence.[b] Nor, in an action in the nature of waste, can he be asked what amount

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[a] Railway Co. *v.* Combs, 51 Ark. 324; Topeka *v.* Martineau, 42 Kas. 387; Elizabethtown & P. R.R. Co. *v.* Pottinger, 10 Bush 185; Fremont, E. & M. V. R.R. Co. *v.* Marley, 25 Neb. 138; Carter *v.* Thurston, 58 N. H. 104; Hargreaves *v.* Kimberly, 26 W. Va. 787; Neilson *v.* Chicago, M. & N. W. Ry. Co., 58 Wis. 516.

[b] Atlantic & G. W. R.R. Co. *v.* Campbell, 4 Oh. St. 583.

of permanent injury the premises have sustained by neglect.(a)

* It has been decided in Ohio, that a person who is present during the trial of a cause, and has heard witnesses describe the manner in which a ford is injured by the erection of a dam across a stream of water below it, is not competent to give his opinion of the damages sustained by the party injured.[1] So, intelligent merchants, well acquainted with the plaintiff and his business, were held not competent to give an opinion as to the damage of the plaintiff in being deprived of the advantage of his own care and oversight.[2] **

§ 1294. **Opinions of value.**—Value must necessarily be proved by the opinions of witnesses. To be qualified to give an opinion of the value of property, one need not necessarily be an expert in the purchase and sale of such property; it is enough if he have a general knowledge of the value of such property.(b) In Whitney *v.* Thacher,(c) Wells, J., said: "It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business, for the conduct of that business, that qualifies him to testify." But the opinion must be founded on reasonable grounds; where no *data*

[1] Shepherd *v.* Willis, 19 Ohio 142.
[2] Lincoln *v.* Saratoga & S. R.R. Co., 23 Wend. 431; Norman *v.* Wells, 17 Wend. 161; Mayor, etc., of N. Y. *v.* Pentz, 24 Wend. 668.

(a) Robinson *v.* Kinne, 1 T. & C. 60.

(b) Burger *v.* Northern P. R.R. Co., 22 Minn. 343; Springfield & S. Ry. Co. *v.* Calkins, 90 Mo. 538; s. c. 3 S. W. Rep. 82; Joy *v.* Hopkins, 5 Denio 84.

(c) 117 Mass. 523.

exist, no opinion can be given. So an opinion as to the value of a contemplated business which was never actually entered upon will not be received.([a])

What the owner would take for land cannot be shown in order to prove its value; nor should the jury be allowed to take as the value of land the amount they would sell it for if owners.([b])

§ 1295. **Value of lands and leases.**—One familiar with a parcel of land may give his opinion of its value.([c]) In a proceeding to take lands under the right of eminent domain, when opinion as to damages is held competent, the opinion of the owner ([d]) or of one acquainted with the value ([e]) may be given both as to the damages sustained and as to the value of the land left. So, in an action for a nuisance, an architect, acquainted with the locality, may be asked if the nuisance depreciated the value of the houses in the neighborhood.[1] So witnesses may give their opinions as to the value of property with and without public improvements.([f]) In Brown *v.* Providence & S. Ry. Co.,([g]) however, it was held improper to allow a farmer to testify as to the value of land for any

[1] Gauntlett *v.* Whitworth 2 C. & K. 720.

([a]) Wakeman *v.* Wheeler & W. M. Co., 101 N. Y. 205; Reed *v.* McConnell, 101 N. Y. 270.

([b]) Kiernan *v.* Chicago, S. F. & C. Ry. Co., 123 Ill. 188.

([c]) Montana Ry. Co. *v.* Warren, 137 U. S. 348; San Diego L. & T. Co. *v* Neale, 78 Cal. 63; White *v.* Hermann, 51 Ill. 243; Lafayette *v.* Nagle, 113 Ind. 425; Ball *v.* Keokuk & N. W. Ry. Co., 74 Ia. 132; Whitman *v.* Boston & M. R.R. Co., 7 All. 313; Swan *v.* Middlesex Co., 101 Mass. 173; Derby *v.* Gallup, 5 Minn. 119; Clark *v.* Baird, 9 N. Y. 183; Robertson *v.* Knapp, 35 N. Y. 91; Cleveland & P. R.R. Co. *v.* Ball, 5 Oh. St. 568; Kellogg *v.* Krauser, 14 S. & R. 137; Pennsylvania & N. Y. R.R. & C. Co. *v.* Bunnell, 81 Pa. 414.

([d]) Snow *v.* Boston & M. R.R. Co., 65 Me. 230.

([e]) Frankfort & K. R.R. Co. *v.* Windsor, 51 Ind. 238; Springfield & S. Ry. Co. *v.* Calkins, 90 Mo. 538.

([f]) Yost *v.* Conroy, 92 Ind. 464.

([g]) 12 R. I. 238.

but farming purposes; he could not, though acquainted with the land, testify to its value as a summer resort.

The value of land may be proved also by evidence showing the value of neighboring land.[a] In Massachusetts it has been held that evidence of sales of neighboring land may be given;[b] but the contrary has been held in Pennsylvania. In Pittsburgh & W. R.R. Co. *v.* Patterson,[c] Clark, J., said:

"The selling price of lands in the neighborhood at the time, is undoubtedly a test of value, but it is the general selling price, not the price paid for particular property. The location of the land, its uses and products, and the general selling price in the vicinity are the *data* from which a jury may determine the market value. The price which, upon a consideration of the matters stated, the judgment of well-informed and reasonable men will approve is the market value. A particular sale may be a sacrifice compelled by necessity, or it may be the result of mere caprice or folly; if it be given in evidence it raises an issue collateral to the subject of inquiry, and these collateral issues are as numerous as the sales."

In estimating the value of land at a given time, evidence of its value six or seven months later is not inadmissible. The law has no presumptions on the subject of changeable values of real estate, and such proof, though liable to be overcome by evidence of a previous change in the interval is not too remote.[d] In Brown *v.* Calumet River Ry. Co.[e] the price paid for a parcel of land several years before was held admissible, as throwing some light on its present value. A resale of the land is evidence

[a] White *v.* Hermann, 51 Ill. 243; and see chapter on Eminent Domain in New York.

[b] Paine *v.* Boston, 4 All. 168; Benham *v.* Dunbar, 103 Mass. 365; Gardner *v.* Brookline, 127 Mass. 358; Roberts *v.* Boston, 149 Mass. 346; *acc.* Cummins *v.* Des Moines & S. L. Ry. Co., 63 Ia. 397.

[c] 107 Pa. 461, 464.

[d] Abell *v.* Munson, 18 Mich. 306.

[e] 125 Ill. 600.

of its value.[a] In Winnisimmet Co. *v.* Grueby [b] it was held that in assessing damages for land taken, evidence could not be introduced of the amount for which an owner of neighboring land offered to sell his land, as evidence of the value of defendant's land.[c] And where the amount for which neighboring land had been sold was shown, evidence that the purchaser had at once been offered an advance was held inadmissible.[d] But in Dalrymple *v.* Hannum [e] the plaintiff was allowed to introduce evidence of an unaccepted offer made by him to the defendant, which the defendant refused to accept, to show of how little value the land was.

In proving the value of a lease, evidence of the amount of rent in preceding years is admissible.[f] And in an action of ejectment the net receipts of the defendant under a lease of the premises is evidence on the question of the value of the use and occupation.[g] In the latter case the court said :

" As an item of evidence on the question of the value of the use and occupation of the farm, it was competent to prove what sum was actually received from it as rent. This, of course, was not conclusive evidence of the value of the use of the farm, but it was competent evidence on the subject. The agreed rent would be strong evidence of the real value of the use and occupation.[h] It is from prices offered, agreed upon and paid, that the value of property or of its use is to be determined, and such prices may be given in evidence to test the correctness and fairness of opinions. Indeed, opinions are made up either from public or private sales and contracts, as regards the value of

[a] Engell *v.* Fitch, L. R. 4 Q. B. 659; Brigham *v.* Evans, 113 Mass. 538.
[b] 111 Mass. 543.
[c] *Acc.* Montclair Ry. Co. *v.* Benson, 36 N. J. L. 557.
[d] Roberts *v.* Boston, 149 Mass. 349.
[e] 54 N. Y. 654.
[f] Fogg *v.* Hill, 21 Me. 529.
[g] More *v.* Deyoe, 22 Hun 208.
[h] Citing Cary *v.* Gruman, 4 Hill 625.

property. Thus it is, that both public and private sales of property are admissible in evidence to determine its true value."[a]

§ 1296. **Of chattels—Opinions of value.**—When the value of a chattel is to be proved, one familiar with that kind of property may state his opinion as to its value.[b] So one familiar with the value of horses may state the difference in value of a horse as it was represented to be and as it was,[c] or before and after the injury complained of.[d] Where a pearl had been lost, one witness was allowed to describe it, and another, who was acquainted with gems, was allowed to state his opinion of its value.[e] To ascertain the value of certain tobacco, a witness was allowed to testify as to the general market value of tobacco produced that year, although he admitted that he could not tell the value of the particular tobacco without seeing it.[f] On the other hand, in an action on an undertaking given on procuring an attachment, it was held that the evidence of witnesses who did not know the goods attached was not admissible where they merely testified as to what would be the value of similar goods when returned after five days' detention, if when taken they were worth $6,000.[g] A witness may testify to the relative value of two articles, although not able to testify to the actual value of either.[h] In

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[a] More *v.* Deyoe, 22 Hun 208, 222.

[b] Western Ry. Co. *v.* Lazarus, 88 Ala. 453; Ohio & M. R.R. Co. *v.* Taylor, 27 Ill. 207; Anson *v.* Dwight, 18 Ia. 241; Patton *v.* Bell, 141 Mass. 197; Browne *v.* Moore, 32 Mich. 254; Whitfield *v.* Whitfield, 40 Miss. 352; Rogers *v.* Ackerman, 22 Barb. 134; McDonald *v.* Christie, 42 Barb. 36; Erd *v.* Chicago & N. W. Ry. Co., 41 Wis. 65.

[c] Haskell *v.* Mitchell, 53 Me. 468.

[d] Louisville, N. A. & C. Ry. Co. *v.* Peck, 99 Ind. 68.

[e] Berney *v.* Dinsmore, 141 Mass. 42.

[f] Draper *v.* Saxton, 118 Mass. 427.

[g] Alexander *v.* Jacoby, 23 Oh. St. 358.

[h] Kronschnable *v.* Knoblauch, 21 Minn. 56.

Blanchard *v.* New Jersey S. B. Co.(a) the value of other vessels with which the plaintiff's vessel could be compared, was held not to be evidence of the value of the plaintiff's vessel. The cost of personal property may be proved as an element of its value.(b) Where the value of use of property is an element of recovery, one who has the necessary knowledge may give his opinion of the value.(c)

§ 1297. **Market value.**—It is proper to ask the value of articles, although the question does not require the market value to be stated.(d) If there is no market for an article at the place where its value is to be determined, the general rule is to ascertain its value at the nearest place affording a market.(e) So where the value of lumber at Detroit was the measure of damages, and the witness a dealer in lumber at Wayne, a place eighteen miles from Detroit, knew the market value of such lumber at Wayne, but not at Detroit, but knew the value at Detroit was higher than at Wayne, his evidence of the value at Wayne was held proper.(f) So evidence of the cost of the goods in the market where they were purchased, adding the expenses of transportation, the duties, and a fair allowance for profits, and also evidence of the sales of like articles for several months before and after the sale in question, and of the repurchase of some of the goods for cash by the plaintiff at advanced rates within two months afterwards, was held admissible.(g) So if

(a) 59 N. Y. 292.

(b) Angell *v.* Hopkins, 79 Cal. 181.

(c) Kennett *v.* Fickel, 41 Kas. 211.

(d) Parks *v.* Morris A. & T. Co., 54 N. Y. 586.

(e) South & N. A. R.R. Co. *v.* Wood, 72 Ala. 451; Hanson *v.* Lawson, 19 Kas. 201; Washington Ice Co. *v.* Webster, 68 Me. 449; McCormick *v.* Hamilton, 23 Gratt. 561.

(f) Savercool *v.* Farwell, 17 Mich. 308.

(g) Eaton *v.* Mellus, 7 Gray 566.

the market price at the time of loss cannot be proved, the market price a few days before or after that time may be shown.[a] A witness who has inquired as to the value in the market has been allowed to state the value.[b] Evidence of sales of an article like the one to be delivered is admissible to show that there is a market.[c]

§ 1298. Evidence of sales.—If sales of property are adduced as evidence of value, they should be sales in the regular course of business.[d] But a sale of the very article the value of which is in question may be shown in evidence of its value,[e] though the sale were a sheriff's sale.[f] So where goods were damaged at sea, evidence of the price brought by the damaged goods at auction upon their arrival was held admissible.[g] So in Tompkins *v.* Kanawha Board,[h] it was held that where goods were to have been sold at an agreed price at the place where their value is to be taken, such agreed price is evidence of their value. In Luse *v.* Jones,[i] in trespass for removing the plaintiff's furniture and interfering with her business as a boarding-house keeper, it was held that, although the furniture was not new, evidence of the price at which a regular dealer sold such articles was admissible as an item in estimating the value. In Jones *v.* Morgan,[j] in estimating the value of household furniture, works of art, and ornaments, the plaintiff

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[a] Eaton *v.* Mellus, 7 Gray 566; Dana *v.* Fiedler, 12 N. Y. 40; Boyd *v.* Gunnison, 14 W. Va. 1.

[b] Thatcher *v.* Kaucher, 2 Col. 698.

[c] De Wolf *v.* McGinnis, 106 Ill. 553.

[d] Meixell *v.* Kirkpatrick, 33 Kas. 282.

[e] Norton *v.* Willis, 75 Me. 580.

[f] McIlhargy *v.* Chambers, 117 N. Y. 532; Hildreth *v.* Fiss, 53 Vt. 684.

[g] Guiterman *v.* Liverpool, N. Y. & P. S. S. Co., 83 N. Y. 358.

[h] 21 W. Va. 225.

[i] 39 N. J. L. 707.

[j] 24 Hun 572.

was allowed to state the price paid for the articles. The court said:

"If the plaintiff had been restricted to direct proof of the value of the property at or near that time, it is evident that no redress could possibly be afforded for the injury and loss which she had sustained. For that reason it was a matter of strict necessity that evidence of a different character should be produced and relied upon, not as controlling in the case, but as a basis from which, in view of succeeding circumstances, a fair valuation of the property might be ascertained. . . . . What is required is that reliable and satisfactory evidence shall be produced from which the value of the property in controversy may be ascertained with a reasonable degree of certainty."

§ 1299. Offers—Price-lists—Quotations.—A mere offer to sell or buy at a certain price, unaccepted, cannot be shown as evidence of value.[a] But offers made in open market are evidence of value,[b] such as statements of dealers in answer to inquiries as to price,[c] or price-lists of manufacturers or dealers.[d] So the official quotations of the exchanges are admissible. Thus in Whitney *v.* Thacher,[e] brokers in Boston, members of a firm doing business and having houses established in Boston and New York, who were familiar with the market value of such goods in New York, and whose information was derived from the daily price current lists and from the return of sales daily furnished them in Boston from New York, were allowed to testify as to the value in New York. Wells, J., said: "An unaccepted offer, as an isolated transaction, is not competent evidence upon the

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[a] Norton *v.* Willis, 73 Me. 580 (*semble*); Thompson *v.* Moiles, 46 Mich. 42.

[b] Norton *v.* Willis, 73 Me. 580 (*semble*).

[c] Harrison *v.* Glover, 72 N. Y. 451 (*semble*).

[d] Cliquot's Champagne, 3 Wall. 114; Harrison *v.* Glover, 72 N. Y. 451. But *contra*, Cook County *v.* Harms, 10 Ill. App. 24.

[e] 117 Mass. 523.

question of value. But in a market regularly attended by buyers and sellers, an offer as well as a sale of an article of recognized uniform character, constantly bought and sold in that market, so as to have a place upon the daily price current lists, may serve to show that the market value of that article did not then exceed the price at which it was offered. It is admissible because of its publicity, and the presumption of the presence of dealers ready to purchase, and who would have done so if the offer had been below the market value. That dealers are themselves guided in their transactions by such indications of the state of the market, makes the fact one that may properly be considered in evidence." In New York it has been held that the "Shipping and Commercial Lists Prices Current" are not admissible to show value unless supported by testimony as to when and how the list was made up; ([a]) and this requirement would seem to be sound and reasonable. In Michigan, however, the market quotations of a Toledo newspaper were admitted to prove the value of shingles at that place on the day of publication; while the defendant was not allowed to prove the price at which he sold other shingles there on that day.([b])

§ 1300. **Presumption against defendant.**—* In one of the earliest cases on the subject of damages in trover,[1] where the action was brought for a jewel, several of the trade being examined to prove what a jewel of the first water, of the size in question, would be worth, the chief-justice of the Queen's Bench directed the jury that, unless the defendant produced the jewel, and showed it not to be of

[1] Armory *v.* Delamirie, 1 Strange 505.

([a]) Whelan *v.* Lynch, 60 N. Y. 469.
([b]) Peter *v.* Thickstun, 51 Mich. 589.

the first water, "they should presume the strongest against him, and make the value of the best jewels the measure of their damages"; which they did.** Where there was no evidence of the quality of cotton converted, it was held that the jury were entitled to assume it to have been of the best quality.(a) But in other forms of action, as assumpsit for goods sold, or debt for money lent, where there is no fraud in the defendant, this rule is reversed, and the jury will be instructed to presume against the plaintiff's demand. Thus, in assumpsit, in the absence of evidence as to the quality of liquor in bottles sold by the plaintiff, they were told, by Lord Ellenborough, to presume that the bottles were filled with the cheapest liquor in which the plaintiff dealt.(b) And, in debt, where the proof was simply that the plaintiff handed the defendant a bank note in reply to a request for money, the English Court of Exchequer held that the jury were rightly instructed to presume it to have been of the lowest denomination.(c)

§ 1301. **Estoppel.**—*Again, the acts of the parties themselves may determine the value of the thing in controversy, and operate like an absolute liquidation of damages. So, in an action on an agreement in which the defendant acknowledged that he had received of the plaintiff certain enumerated goods, attached by the plaintiff as a depty sheriff, estimated at fifteen hundred dollars, and which the defendant promised to keep safely and deliver to the plaintiff on demand; it was held that the defendant could not give evidence that the goods were of

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(a) Curry *v.* Wilson, 48 Ala. 638. So in an action against a carrier for non-delivery. Bailey *v.* Shaw, 24 N. H. 297.

(b) Clunnes *v.* Pezzey, 1 Camp. 8.

(c) Lawton *v.* Sweeney, 8 Jur. 964. See Jones's Appeal, 62 Pa. 324.

less value than the specified sum, but that the valuation in the receipt was conclusive.[1] **

§ 1302. **Value of construction.**—In order to prove the value or expense of repairs on a building, evidence may be received of the value of the materials and labor required.(a) So, in arriving at the value of a sleigh, the value of its component parts may be shown.(b) Upon the question of the value of a house or other building, one who is qualified to do so may give an estimate of the expense of building it.(c)

§ 1303. **Of services.**—The value of services may be proved by the opinion of one familiar with such value.(d) So the value of an attorney's services may be proved by an attorney who knows what the services were,(e) or upon a proper hypothetical statement.(f) But the value of skilled services is to be estimated not by inquiring what A. or B. would charge for such services, but what the services are fairly worth by the common usage or custom of compensation; and it is error to receive the testimony of witnesses as to what they would charge.(g) But evidence is proper of the price usually charged and received for similar services by others at the same place.(h)

[1] Jones *v.* Richardson, 10 Met. 481.

(a) Hough *v.* Cook, 69 Ill. 581.
(b) Hildreth *v.* Fitts, 53 Vt. 684.
(c) Tebbetts *v.* Haskins, 16 Me. 283; Hills *v.* Home Ins. Co., 129 Mass. 345; Southern Oil Works *v.* Bickford, 14 Lea 651.
(d) Parker's Heirs *v.* Parker's Admr., 33 Ala. 459; Brill *v.* Flagler, 23 Wend. 354; Lewis *v.* Trickey, 20 Barb. 387.
(e) Covey *v.* Campbell, 52 Ind. 157.
(f) Williams *v.* Brown, 28 Oh. St. 547.
(g) Pfeil *v.* Kemper, 3 Wis. 315.
(h) Stanton *v.* Embrey, 93 U. S. 548; Vilas *v.* Downer, 21 Vt. 419.

§ 1304. **Other value.**—One who knows the sort of board and care furnished to an insane person may testify as to its value.[a] In New Hampshire it was held that as evidence of the value of board the price of similar board at a hotel ten miles distant might be shown.[b]

§ 1305. **Evidence of malice or intention.**—All facts directly bearing on the question of malice can be given in evidence. In Voltz *v.* Blackmar[c] it was said that "where exemplary or punitive damages are claimed, all the circumstances immediately connected with the transaction, tending to exhibit or explain the motive of the defendant, are admissible in evidence." The action was for false imprisonment, and it was held that the facts which induced the defendant to make the arrest should have been considered by the jury as bearing on the question of malice. In an action of trespass *q. c. f.*, where the defendant's malice might be a ground of exemplary damages, it has been held, in New Hampshire, that the plaintiff, being a competent witness, might testify what his motive and purpose were in doing the acts complained of.[d] In Harmon *v.* Harmon[e] it was said that acts against which the statute of limitations had run, might be given in evidence on the question of malice. In Currier *v.* Swan,[f] in an action for trespass *quare clausum fregit*, it was held that the defendant could show that he and the plaintiff had had a quarrel in the afternoon, but could not show its details. The court said: "Otherwise there would have been nothing to indicate to the jury but that the house

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[a] Kendall *v.* May, 10 All. 59.
[b] Cross *v.* Wilkins, 43 N. H. 332.
[c] 64 N. Y. 440.
[d] Norris *v.* Morrill, 40 N. H. 395.
[e] 61 Me. 233.
[f] 63 Me. 323.

was entered for the purpose of robbery and plunder, or something of the kind. The fact of a previous affray might have some weight upon the question of the amount of damages recoverable, and might legitimately be regarded as a part of the transaction to be investigated in this suit."

§ 1306. **Of the duration of life.**—Where the amount of damages depends on the length of a life in being, as in the case of a lease for life or a dower right, the courts, if not by the assent of parties, usually by the rules of their practice, resort to the standard annuity tables, as the Northampton or Wigglesworth Tables. The value of the life for a year being ascertained by the jury, the expectation of the life becomes a matter of calculation from the tables.[a] So in the statutory action for causing death,[b] or in an action for permanent personal injury.[c] But in Shippen & Robbins's Appeal,[d] in estimating the value of an estate by the curtesy, the court held that the Carlisle Tables were not authoritative, but that the probable expectation of life must be estimated from the particular circumstances.

§ 1307. **Of pain.**—The fact of death by drowning is enough of itself to prove both physical and mental pain.[e] When pain is to be proved affirmatively, evidence of the acts and exclamations of the sufferer are competent evi-

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[a] How *v.* How, 48 Me. 428.

[b] Georgia R.R. & B. Co. *v.* Oaks, 52 Ga. 410; Central R.R. Co. *v.* Crosby, 74 Ga. 737; McKeigue *v.* Janesville, 68 Wis. 50.

[c] Atlanta & W. P. R.R. Co. *v.* Johnson, 66 Ga. 259; Northeastern R.R. Co. *v.* Chandler, 10 S. E. Rep. 586 (Ga.); Coates *v.* Burlington C. R. & N. Ry. Co., 62 Ia. 487; Lincoln *v.* Smith, 45 N. W. Rep. 41 (Neb.); Texas M. Ry. Co. *v.* Douglass, 69 Tex. 694.

[d] 80 Pa. 391.

[e] Clark *v.* Manchester, 64 N. H. 471.

dence.[a] Thus, in an action for breach of promise of marriage, the plaintiff's father was allowed to testify that after the defendant left her, she became more melancholy, possessed less life and animation, and was found weeping.[b]

§ 1308. **Of a former verdict.**—The jury should not be told the amount of a former verdict in the case, and if told they should be cautioned to disregard it.[c] Nor can they be informed of the amount of the verdict in another similar case.[d]

§ 1309. **Physical examination.**—The court has discretion to order a witness to do some physical act before the jury, such as walking across the room.[e] An injured party may exhibit his wounds to the jury,[f] and such is probably the actual practice everywhere, at least in the case of ordinary injuries. The case commonly cited in support of the proposition does not go so far.[g] In that case the injured party was allowed to exhibit his wounds to a surgeon who was testifying, though the defendant objected that the jury might see them, and be influenced thereby. But a case in the Superior Court of New York decides that the injury may be exhibited to the jury.[h]

An interesting question has recently arisen as to the right of the court to compel the injured party to submit to an examination by physicians. The right was con-

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[a] Bacon *v.* Charlton, 7 Cush. 581; Caldwell *v.* Murphy, 11 N. Y. 416; McKeigue *v.* Janesville, 68 Wis. 50; King *v.* Oshkosh, 75 Wis. 517.

[b] Tobin *v.* Shaw, 45 Me. 331.

[c] Ball *v.* Keokuk & N. W. Ry. Co., 74 Ia. 132.

[d] Baldwin's Appeal, 44 Conn. 37.

[e] Hatfield *v.* St. Paul & D. R.R. Co., 33 Minn. 130.

[f] Schroeder *v.* Chicago, R. I. & P. Ry. Co., 47 Ia. 375.

[g] Mulhado *v.* Brooklyn City R.R. Co., 30 N. Y. 370.

[h] Jordan *v.* Bowen, 46 N. Y. Super. Ct. 355.

tested on the ground that it was an indignity to the injured party, but the doctrine seems now to be well settled that the court may in its discretion compel him to submit to a reasonable and proper examination by disinterested physicians.(a)

§ 1310. **Approximate evidence.** — * The application of the rules which we have thus examined, in regard to the proof necessary to establish a claim for damages, often renders it difficult, if not impossible, to arrive with precise accuracy at the object of the inquiry. But justice is after all but an approximate science, and its ends are not to be defeated by a failure of strict and mathematical proof. The following language of Mr. Justice Story is full of good sense, and susceptible of frequent and wide application :

"It is said that it is difficult and indeed impracticable, to ascertain its true and exact value, when thrown overboard. There may be difficulty, and perhaps an impossibility, to ascertain its exact and minute value, for we have no means of weighing it in scales, or fixing its positive price. But the same difficulty occurs in many other cases of insurance; as in cases of injuries to sails, or rigging, or spars, by tempest, or by cutting them away in cases of jettison; and yet no one doubts that they must be contributed for according to their value, ascertained by a jury, in the exercise of a sound discretion, upon proper evidence. Suppose that fruit is insured, and the vessel has a long passage, in which, by ordinary waste and decay, it must suffer some deterioration, and then a storm occurs, in which it suffers other positive damage and injury, or there is a jettison thereof; how are we to ascertain what diminution is to be attributed to natural waste and decay, and what to the perils of the seas? or what was its true value at the time of the jettison? There can be no positive and absolute certainty. The

(a) Schroeder *v.* Chicago, R. I. & P. Ry. Co., 47 Ia. 375; Atchison, T. & S. F. R.R. Co. *v.* Thul, 29 Kas. 466; Walsh *v.* Sayre, 52 How. Pr. 334; White *v.* Milwaukee C. Ry. Co., 61 Wis. 536.

most that can be done, is to ascertain, by the exercise of a sound judgment, what, under all the circumstances, may reasonably be attributed to one cause, and what to the other. Absolute certainty in cases of this sort is unattainable. All that we can arrive at is by an approximation thereto; and yet no man ever doubted that such a loss must be paid for if it is covered by the policy."[1] **

[1] Rogers *v.* Mechanics' Ins. Co., 1 Story 603, 609.

CHAPTER XLIV.

COURT AND JURY.

§ 1311. Relative power of judge and jury.
1312. Analogies of Roman jurisprudence.
1313. Formulæ.
1314. Changes wrought by the Empire.
1315. Origin and development of Anglo-Saxon judicial procedure.
1316. Former indefinite separation between province of court and of jury.
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§ 1318. Exemplary damages—Aggravation and mitigation.
1319. Modifications—Setting aside verdict.
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§ 1311. **Relative power of judge and jury.** — * As the final decision of every case involving an issue of fact is pronounced by the jury in giving their verdict, and as that verdict also expresses the amount of compensation which the party in fault is to make, it is plain that, unless the court retain to itself some control over the action of the jury, their power over the subject of remuneration would be practically unlimited. We have, then, yet to see what remedy is provided if the jury disregard the rules laid down for their government; and this necessarily brings us to a consideration of the relative powers of the judge and the jury.

§ 1312. **Analogies of Roman jurisprudence.**—One of the most marked peculiarities of the Anglo-American system

of jurisprudence, perhaps its most striking feature, is that division of power by which the decision of questions of law is given to the court, and that of questions of fact to the jury. It is an error to suppose that this division is altogether peculiar to our system, or that it is exclusively of English origin. The recent labors of the German scholars, assisted by the discovery of Gaius, in 1816, have disclosed the true nature of the procedure by the *formula* in the republican period of the Roman jurisprudence; and the analogies that it furnishes on the present branch of our subject are too striking to be overlooked.

The despotism of Augustus and his successors introduced changes into the administration of justice analogous to those which it wrought in the general framework of the imperial government. Its peculiar characteristics were centralization and despotism; it established in all branches of the system a gradation of ranks, deriving their existence from and dependent upon the will of the emperor alone, and it destroyed every vestige of popular action. The first and most important of these changes in the machinery of the law was by abolishing the *judices* or jurors, to make the judges absolute masters of the whole cause, subject only to the right of appeal; which, in probably all cases, might carry the suitor before the Cæsar himself; and this led directly to the adoption of written and secret instead of oral and public discussion. Thus was produced the system which, in its general outline, ruled continental Europe almost exclusively till the adoption of the Code Napoleon.

But the plan on which justice was administered at Rome in the time of Cicero, perhaps the most truly great period of its development, was very different. The Romans during their republican epoch were too jealous

of power to give to the judiciary an uncontrolled authority over questions both of law and fact. The judicial functions were divided, as with us, by an analogous and in some cases by an identical line. The suit was instituted before a magistrate, usually the prætor; and the proceedings before him were termed *in jure*. Here the cause of action was stated, the defense set up, and the issue whether of law or of fact formed. In other words, the pleadings were put in. To this issue was then joined the instructions proper for its trial, and the issue and instructions together were termed the *formula*. A *judex* or referee was then appointed. This was called *datio judicis*. The cause was then turned over to him; and he decided the question submitted to him, according to the instructions contained in the *formula*. The proceedings before him were termed *in judicio*.

§ 1313. **Formulæ.**—The *formula* succeeded the old *legis actiones*, which, by their technical severity, had become odious. These forms were abolished, and the *formula* introduced, by the *Lex Æbutia*, the precise date of which is uncertain, but the better opinion would seem to be that it was passed early in the seventh century of the city, or not long before the period of Cicero.[1]

The *formulæ* were of two kinds, according as they turned on questions of law or questions of fact, *formulæ in jus conceptæ* and *formulæ in factum conceptæ*. A single instance of the latter kind will sufficiently exhibit their character: *Judex esto; si paret A. Agerium apua N. Negidium mensam argenteam deposuisse, eamque dolo malo N. Negidii A. Agerio redditam non esse, quanti ea res erit tantam pecuniam judex N. Negidium A. Agerio condemnato; si non paret, absolve.* Which may be rendered thus: Let this cause be referred to ——. If it shall

[1] Gaius by Heff, cap. vii, p. 23.

appear that A. Agerius deposited a silver table with N. Negidius, and that through the fraud of the latter it has not been returned to the owner, let the judge condemn N. Negidius to pay to A. Agerius its value. If it shall not so appear, let him decide for the defendant. This is precisely such a charge as might be given to a jury any day in an English or American court.

There is a passage in Cicero, where, while denouncing the perversion of the administration of justice under Verres in Sicily, he gives a very striking picture of the uses and abuses of this division of the judicial functions.[1] "No one," he exclaims, "can hold or recover his house, his estate, his paternal property, if, when they are sued for, a dishonest prætor, from whom there is no appeal, appoints any one whom he pleases judge; or if a profligate and worthless judge decides what the prætor orders; or if, again, the prætor so frame the order (*formula*) that not even the wisest and best judge can decide otherwise. If, for instance, he appoints L. Octavius (an unexceptionable man) *judex* with the *formula*, *if it shall appear that the property in controversy belongs to P. Servilius, order him to deliver it to Catulus*, is not Octavius forced to compel Servilius to deliver the property to Catulus, although it do not belong to him?" This is precisely what might occur under our procedure, if the judge were corrupt; and without any corruption, it is precisely the error which the system of exceptions to the charge is intended to correct.

The *formula* thus took the place of our charge to the jury. As that charge does, it stated hypothetically the verdict or judgment to be rendered, and gave the instructions according to which the issue should be decided. The only material difference is, that it was in some cases

[1] In Verr. II, l. 2, § 12.

given before the witnesses were heard. The state of facts was therefore assumed to appear correctly in the allegations of the parties; and the instructions of law arising on these facts were given before the testimony was taken. This may now appear awkward and inconvenient, but does not in principle differ from our own mode.

§ 1314. **Changes wrought by the Empire.**—This system was, as has been already said, effaced by the despotism of the empire. The independence of such a judiciary was, of course, hostile to that centralization which was the essence of the imperial organization; the *judices* were abolished, and the decision of the entire cause given to the court alone. This resulted in the abolition of all oral discussion; and such was the system in force at the time when the Institutes of Justinian condensed and embodied the Roman law. Such, too, was the system which was adopted when civilization resumed its progress in continental Europe, and so it remained till the French reforms introduced the jury in certain cases.

§ 1315. **Origin and development of the Anglo-Saxon judicial procedure.**—In the meantime, however, in the island inhabited by that great people from whom we derive our origin, a system analogous to the Roman system in its best days had grown up; a system of unknown origin, whether a relic of Roman, or a child of German liberty, it is perhaps impossible now to say, but marked by very peculiar and distinct features, and claiming as its chief merits two great principles, oral and public discussion, and a division of the judicial functions between the court and the jury.[1] **

[1] Nor is the division of power between the magistrate and the *judex*, the only important analogy between the Roman and the English systems of jurisprudence. Two different and distinct bodies of law, as distinct and different as common law and equity with us, existed in the early days of the Ro-

§ 1316. Former indefinite separation between province of court and of jury.—* It is very plain, from the early records of our jurisprudence, imperfect as they are, that the relative powers of the court and the jury were at first very loosely defined, and that many important changes and modifications have been from time to time introduced. So, originally, the jurors were the witnesses themselves, and found their verdict on their own knowledge of the facts. And in a very large class of cases, not falling within those in which exemplary damages may be claimed, the jury exercised an almost unlimited control over the subject of remuneration. On the other hand, the court, in many cases of default and demurrer, took the disposition of the facts of the case to themselves, and pronounced the judgment. Thus, it was at one time held that the court could dispose of the case if the plea were sent to be tried in a foreign county, for the jury there had not full knowledge of the fact.[1] And so, where the court could increase damages, it was held they could mitigate them.[2] So, also, in an early author, it is said, that "though the justices use to award inquest of damages when they give judgment by default, yet they themselves may tax the damages if they will."[3] So, too, from another early case, where judgment was given by default, it seems clear that the judges originally might award damages without the intervention of a writ of inquiry.[4] So, too, on demurrer, and in actions of debt, the sum being certain, this

man system. *La civilization Romaine*, says Troplong, *s'est developpée sous l'influence de deux elemens, qu'on pourrait en quelque sorte appeler de première et de seconde formation, et qui ont vecu ensemble dans une longue alternative de lutte et de rapprochement, jusque ce que le temps ait amené leur fusion plus ou moins complète. . . . . Sa formule la plus large et la plus haute c'est le jus civile et l'æquitas, sans cesse opposés l'un à l'autre, comme deux principes distincts et inegaux. De l'Influence du Christianisme sur le Droit Civil des Romains, par* M. Troplong, ch. iii.

[1] 1 Rol. 572, l. 50.

[2] 1 Rol. 572, l. 25–8; 573. l. 7.

[3] Viner Abr. Dam. I. 3.

[4] So says Brooke, Dam. 55. *Le def. fist defaut et le pl recouer dams. a lui, il. taxe p. l'court et no dam. come il cout, quod nota q. le court m. taxa les Damages.*

power seems to have been exercised at a much later day.[1]

The following case shows the unsettled condition of the law in the respect we are now considering. A motion being made to increase damages, because the jury had only given twelve pence, whereas the plaintiff's arm was broken; Rolle, C. J., refused, because it did not appear by the declaration what manner of maiming it was that he received.[2] It was early decided, however, that the justices of Nisi Prius could not increase the damages,[3] nor the court on the certificate of the justices of Nisi Prius.[4] ** The court, at a comparatively early day, refused to increase the damages on an affidavit of all the jurors, that they had thought the effect of their verdict would be to give the plaintiff more than it did, when the application was made "at a distance of time after trial." ([a])

In certain cases, however, the power of the court over the verdict was allowed. So, in some instances, on bills of exchange, the court assessed the damages without the intervention of a jury.[5] So, in case of mayhem, the courts exercised the power of altering, and even increasing the verdict. Thus, where a verdict had been found for the plaintiff of £150, and it was moved to increase the damages, Lee, C. J., said: "There is no doubt but the court can increase the damages in this case, even

[1] Page 56: *Car sur demur. in ley, le court poet agard damag sans inquire de ceo p. curiam qd. nota. Vide*, also, *pl.* 59-68, 194. See Sayer on Damages, ch. xx, 105; Holdipp *v.* Otway, 2 Sand. 102; 21 Car. 2; Sayer, 107.

[2] Jervis *v.* Lucas, Style 345.

[3] 1 Rol. 573, l. 30.

[4] 1 Rol. 572, l. 20.

[5] Robinson *v.* Reynolds, 2 Q. B. 196; Clement *v.* Lewis, 3 Br. & B. 297. So in New York the damage could be assessed by the clerk, on promissory notes, bills, etc., but not on the common counts nor unliquidated demands; and in regard to this, several cases have been decided. Burr *v.* Waterman, 2 Cow. 36 *n.*; Colden *v.* Knickerbacker, 2 Cow. 31; Rogers *v.* Coleman, 3 Cow. 62; Beard *v.* Van Wickle, 3 Cow. 335; Seeber *v.* Yates, 6 Cow. 40.

([a]) Jackson *v.* Williamson, 2 T. R. 281.

upon view of the party maimed." But they held the £150 sufficient, and discharged the rule.[1] By the practice which prevailed for a time, the court, in actions for injuries to the person, itself often took a view of the injury, and thereupon increased or mitigated the damages found by the jury according to its judgment.(a) So where in such a case a jury gave twenty marks damages, on a view in court, and information of the surgeons present, the court increased the damages, because the party lost the use of his arm.(b) And as lately as 1856, an appeal from the decision of the circuit judge denying a motion to increase the damages *super visum vulneris* was formally argued before the South Carolina Court of Appeals, in an action of trespass *vi et armis*, where the jury had awarded the moderate sum of $30 for a mayhem, whereby one of the plaintiff's eyes and his right thumb were destroyed. The court held that the old common-law practice, on which the motion was founded, had been abrogated by disuse. The rule gradually developed was now long established, that in all cases sounding in damages, these damages are to be assessed by a jury under the direction of the court, and not by the court independently of the jury.(c) * But the fluctuations and oscillations of the system have been gradually corrected and brought under fixed rules. The progress of time and the accumulation of experience enable us now to draw the lines of demarkation with great clearness, and the complication of the machinery disappears when carefully examined.

[1] Brown *v.* Seymour, 1 Wils. 5.

(a) See the cases collected in Rolle's Abr., pp. 571, 572; also, Brooke, Dam. 49, 86, 87.

(b) Freeman *v.* Trevers, 1 Rol. Abr. 572.

(c) McCoy *v.* Lemon, 11 Rich. L. 165.

§ 1317. **Present separation of functions.**—The first leading proposition on which the whole structure of our system depends is, that the court decides all questions of law. Statutes are expounded, contracts interpreted, written instruments construed, evidence admitted or excluded, by the court and by the court alone.[1] And it necessarily follows from this, that if the jury disregard the instructions of the court on any question of law, their verdict will be set aside. It is by the exercise of this power alone that the control of the court over questions of law can be preserved. The correlative proposition to this is, that the jury decides all questions of fact. Where the facts are admitted, the rights of the parties must depend on a pure question of law, and they are, of course, under the control of the court; but the instant that an issue of fact is presented, the decision of the cause passes from the court to the jury. The rule giving the jury the decision of all questions of fact, if no exception were admitted, would, as has been said, effectually make the jury masters of the whole matter in controversy. Various modifications have, therefore, been introduced to it;** and in some cases the rule is changed by statutory enactment. Thus, the Revised Statutes of Indiana have abrogated the common-law rule, that, in an action of tort, the court cannot assess the damages. Under that provision the right to a jury trial of the question of damages is waived by not appearing.([a]) And, in Louisiana, the Supreme Court have power to increase the damage on appeal.([b]) And it is well settled that provisions of law providing for the ascertainment of damages without the intervention of a jury, where no issue of fact is involved (as in the case of

[1] U. S. *v.* Hodge, 6 How. 279.

([a]) Langdon *v.* Bullock, 8 Ind. 341.

([b]) Donnell *v.* Sandford, 11 La. Ann. 645.

the taking of land under the right of eminent domain), do not violate the constitutional requirement of trial by jury.[a]

§ 1318. **Exemplary damages—Aggravation and mitigation.**—We have already seen [b] that the allowance and amount of exemplary damages is a question for the jury. The court has, as in every case involving the determination of questions of fact, the right to instruct the jury that there is no evidence to justify them in allowing exemplary damages, and it is error to submit the question of exemplary damages to the jury if there is no such evidence;[c] and the court has the power in this, as in any other case, of setting aside the verdict as excessive.[d] But if there is any evidence which would justify the jury in allowing exemplary damages, the question whether such damages shall be allowed, and if so, what the amount of them shall be, is entirely for the jury, and a direction that they shall give exemplary damages is erroneous.[e]

Upon the same principle the amount of weight to be allowed evidence in mitigation or aggravation is entirely for the jury; and it would seem that the question whether certain evidence tends to mitigate or aggravate damages is one of fact for the jury.[f] It has, however, been said in Missouri [g] that "what circumstances will mitigate or aggravate a wrong done, is a question of law, and if any such circumstances exist, they should be pointed out by the court.

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[a] Bonaparte *v.* Camden & A. R.R. Co., 1 Bald. 205; Beekman *v.* Saratoga & S. R.R. Co., 3 Pai. 45.

[b] §§ 387, 388.

[c] § 387.

[d] § 388.

[e] Neeb *v.* Hope, 111 Pa. 145; see § 387.

[f] See § 52.

[g] Rains *v.* St. Louis, I. M. & S. Ry. Co., 71 Mo. 164.

§ 1319. **Modifications—Setting aside verdict.**—* In the first place, a verdict may be set aside because it is against the weight of testimony. This power is, however, very sparingly exercised; and on mere questions of fact the court always interferes with great hesitation and reluctance. So, a verdict will not be disturbed merely because it appears that the jury have reasoned incorrectly. In a case in the English Common Pleas, Maule, J., said: "We are not, however, to set aside a verdict because the jury, one *or all* of them, may have reasoned inconclusively. If such a doctrine were to prevail, scarcely any verdict would stand. The trial by jury is not founded upon a supposition so absurd, as that the whole twelve will reason infallibly from the premises to the conclusion."

So, again, where a judge who tries a cause in trespass recommends a verdict for nominal damages, but the jury give substantial damages (£5), such a verdict will not be set aside as perverse.[1] And this rule has been repeatedly affirmed in this country. So, in Mississippi, it has been decided that a verdict will always be permitted to stand, unless it is opposed by a decided preponderance of the evidence, or is based on no evidence whatever;[2] and, in Texas, that the verdict of a jury founded on conflicting testimony will not be set aside, unless it be very apparent that they decided wrong.[3]

§ 1320. **Excessive damages — Power of court.** — The court, again, holds itself at liberty to set aside verdicts and grant new trials in that class of cases where there is no fixed legal rule of compensation, whenever the damages are so excessive as to create the belief that the jury

[1] Chilvers *v.* Greaves, 5 Man. & Gr. 578.

[2] Cicely *v.* State of Mississippi, 13 Sm. & M. 202.

[3] Perry *v.* Robinson, 2 Tex. 490.

have been misled either by passion, prejudice, or ignorance. But this power is very sparingly used, and never except in a clear case. So, in an action for malicious indictment of the plaintiff for perjury, where a verdict of £400 was obtained, on a rule for new trial it was insisted that the verdict was excessive. But it was refused, and Lord Mansfield said: "New trials are not to be granted in this class of cases without very strong grounds indeed, and such as carry internal evidence of intemperance in the minds of the jury."[1]

The doctrine has been repeatedly affirmed in this country. So Mr. J. Story has decided that in cases of *tort* the verdict will not be disturbed unless it is so excessive and outrageous with reference to all the circumstances of the case, as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them.[2] So, again, the same sagacious judge has said: "A court of law will not set aside a verdict upon the ground of excessive damages, unless in a clear case where the jury have acted upon a gross mistake of facts, or have been governed by some improper influence or bias, or have disregarded the law."[3] Again, in another case, Mr. Justice Story said:

"The damages are certainly higher than what, had I sitten on the jury, I should have been disposed to give; and I should now be better satisfied if the amount had been less.(a) . . . . It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury, merely because it exceeds that meas-

[1] Gilbert *v.* Burtenshaw, Cowper 230.
[2] Whipple *v.* Cumberland Manuf'g Co., 2 Story 661.
[3] Wiggin *v.* Coffin, 3 Story 1.

(a) Much the same language was used by the court in Harris *v.* Louisville, N. O. & T. Ry. Co., 35 Fed. Rep. 116.

ure. The court, in setting aside a verdict for excessive damages, should clearly see that they are excessive; that there has been a gross error; that there has been a mistake of the principles upon which the damages have been estimated; or some improper motives, or feelings, or bias, which have influenced the minds of the jury. . . . . Upon a mere matter of damages, where different minds might, and probably would, arrive at different results, and nothing, inconsistent with an honest exercise of judgment, appears, I, for one, should be disposed to leave the verdict as the jury found it."[1]

So, in New Jersey, too, it has been declared that the court, in actions of trespass for personal torts, where damages can be gauged by no fixed standard, but necessarily rest in the sound discretion of the jury, interferes with a verdict on the mere ground of excessive damages with reluctance, and never except in a clear case.[2] And it has been said that although it is conceded that the courts have the power of granting a new trial in cases of *crim. con.*, still it seems that the power has never been exercised.[3] Even in cases where rules of law have been disregarded, or where for any reason the verdict cannot be supported, the power of the court to set aside the decision of the jury will not be exercised without regard to the justice of the case. So, where a verdict was obtained for principal and interest, as to which latter the defendant was clearly liable, but there being no count adapted to it, the verdict was not strictly regular, the court nevertheless refused to set it aside, saying: "In motions for new trial, the court may fairly endeavor to do that which advances the justice of the cause, and by refusing this rule we only save the defendant from paying with the tremendous interest of accumulated costs, what he is in justice bound to pay at once."[4] ** A case in the

[1] Thurston *v.* Martin, 5 Mason 497, 499.
[2] Berry *v.* Vreeland, 21 N. J. L. 183.
[3] Duberley *v.* Gunning, 4 T. R. 651; Smith *v.* Masten, 15 Wend. 270.
[4] Harrison *v.* Allen, 2 Bing. 4.

English Court of Exchequer illustrates the jury's command of the damages, where no rule of law is violated. The plaintiff, who claimed special damage from a carrier for non-delivery of goods, had sold them for as much as he could have obtained if there had been no delay, and the defendant paid into court £10, which the court considered ample to cover the expense of a journey he had taken to look after the goods, and all his actual damages. The jury having found a verdict for £5 more than had been paid in, a motion was made to set it aside as perverse. (The damages being under £20, the motion could not, under the English practice, be entertained on the ground that they were excessive.) The court, although considering the amount decreed clearly too large, reluctantly refused to disturb the verdict, as the question whether the amount paid into court was a sufficient compensation for the plaintiff's pecuniary loss had been properly left to the jury, and the verdict was not contrary to any direction of the judge at Nisi Prius.(a) "I doubt much," says Mr. Justice Jackson, in delivering an opinion in the Court of the Irish Exchequer Chamber, "whether in any case sounding in damages, for an acknowledged breach of covenant, the judge ought to take it upon himself to *direct* a verdict for nominal damages." (b)

(a) Adams *v.* The Midland R. Co., 31 L. J. (N. S.) Ex. 35. See, as to the boundary between the power of the court and that of the jury on this subject, Smith *v.* Symonds, 1 L. T. R. (N. S.) 299, where the construction of a document was left to the jury. In California, it is doubtful whether the courts of first instance have power to interfere when verdicts are excessive. Payne *v.* Pacific Mail Steamship Co., 1 Cal. 33. In New York, the Court of Appeals cannot review the question of excessive damages. Metcalf *v.* Baker, 57 N. Y. 662; Starbird *v.* Barrows, 62 N. Y. 615; Maher *v.* Central Park, N. & E. R. R.R. Co., 67 N. Y. 52. Unless the excess arises from error in the judge's charge. Mechanics' & T. Bk. *v.* Farmers' & M. Nat. Bk., 60 N. Y. 40; Starbird *v.* Barrows, 62 N. Y. 615.

(b) Strong *v.* Kean, 13 Ir. L. R. 93.

The same ground was taken in City of Ottawa *v.* Sweely,(a) another action for personal injuries, and the court said: "It must not be supposed, however, that verdicts in cases of torts are beyond control; but they should stand, unless they are grossly erroneous, or there is a palpable misconception of the testimony, or they are the result plainly of passion or prejudice." In cases where exemplary damages are allowable, verdicts are rarely set aside. The obvious reason for this custom is that it is not easy to decide that such a verdict is so large as to be against evidence. It is only in extraordinary cases that the court will act.(b) And so, in Walker *v.* Erie Railway Co.,(c) an action to recover damages for personal injuries, a motion to set aside a verdict for $20,000 was denied, Daniels, J., saying: "The rule so carefully maintained and guarded in actions upon contracts, and for tortious injuries to property, is incapable of being applied where the injury is to the person; for those injuries are without precise pecuniary measure. The law has, accordingly, in this class of cases, committed the determination of the amount of damages to be awarded to the experience and good sense of jurors. And where the verdict rendered by them may reasonably be presumed to have resulted from an honest and intelligent exercise of judgment upon their part, the policy of the court is, and necessarily must be, not to interfere with their conclusion." So where in an action against a railroad company by a farmer for the death of his wife, who had been thrown out of his market wagon and killed

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(a) 65 Ill. 434, 436.

(b) Chicago & Alton R.R. Co. *v.* Wilson, 63 Ill. 167; Singer Manf. Co. *v.* Holdfodt, 86 Ill. 455; Barnette *v.* Hicks, 6 Tex. 352; McGehee *v.* Shafer, 9 Tex. 20.

(c) 63 Barb. 260, 267.

through collision with the defendant's train, although the wagon had descended to the point of collision down a gradual slope for more than a quarter of a mile, in plain view of the railroad, upon which the train could have been seen coming at a great distance, and the court considered that there was not a doubt that the evil happened from either the plaintiff's misfortune or fault, for neither of which was the company liable; yet as the case had been given to the jury without any error in law, they felt themselves compelled to affirm a judgment on a verdict of $9,150 for the plaintiff.(a) The discretion of the court may also be governed, to a limited extent, by previous decisions in other cases.(b) This practice cannot, however, be considered as strict matter of law. The argument has been sometimes advanced, that when the legislature has fixed the limit to the amount of damages recoverable for causing the death of a human being, it is improper, in actions for personal injuries, to allow a greater sum to the person injured than could have been obtained by his representative, under the statute, in case of his death.(c) The reasoning is not viewed with favor by the courts. These statutes are enabling in their nature and not restrictive, and the intention of the legislatures was evidently to extend, not to lessen, the rights of recovery. Besides this, the damages in the statutory action go to the family of the person whose death the defendant has caused, as compensation for *their pecuniary loss through his death;* while, in the common-law action, it is the person injured who recovers for the damage done to

(a) Pennsylvania R.R. Co. *v.* Goodman, 62 Pa. 329.

(b) Louisville & N. R.R. Co. *v.* Fox, 11 Bush 495; Travis *v.* Barger, 24 Barb. 614.

(c) Illinois Cent. R.R. Co. *v.* Welch, 52 Ill. 183; Collins *v.* Albany & S. R.R. Co., 12 Barb. 492; Murray *v.* Hudson River R.R. Co., 47 Barb. 196.

himself. The two causes of action are thus fundamentally different, and one cannot furnish a measure of damages for the other.

In some courts which sit exclusively to decide points of law, the question of excessive damages is not considered, being left entirely to the trial court. It has been so determined in the New York Court of Appeals,[a] and in the Supreme Courts of New Hampshire,[b] Oregon,[c] and South Carolina.[d] In Connecticut it was said that the Supreme Court would not review a verdict unless all the evidence were before them.[e]

§ 1321. What damages are excessive.—The power of the court to set aside a verdict on account of excessive damages is closely connected with its right to interfere when the verdict is against evidence. The power to disturb the verdict, as being excessive, rests in the discretion of the court.[f] But this discretion does not supplant that of the jury. The court must decide whether there is enough evidence to support the verdict, and if in its opinion there is sufficient, then the discretion of the court ceases. Up to that point, the discretion of the jury is unrestrained. Hence it follows that verdicts are often sustained, although they do not meet with the full approval of the court.[g] If the amount of damages given by the jury is between the highest and lowest estimate of the witnesses, the verdict will usually

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[a] Gale *v.* New York C. & H. R. R.R. Co., 76 N. Y. 594.

[b] Merrill *v.* Perkins, 61 N. H. 262.

[c] Nelson *v.* Oregon Ry. & N. Co., 13 Ore. 141.

[d] Petrie *v.* Columbia & G. R.R. Co., 29 S. C. 303.

[e] Page *v.* Merwin, 54 Conn. 426.

[f] Duffield *v.* Tobin, 20 Ga. 428.

[g] Saunders *v.* London & N. W. Ry. Co., 2 L. T. R. (N. S.) 153; George *v.* Law, 1 Cal. 363; Letton *v.* Young, 2 Metc. (Ky.) 558; Potter *v.* Thompson, 22 Barb. (N. Y.) 87.

be permitted to stand.[a] The court will interpose its power only in extreme cases.[b] The verdict must be clearly excessive to be set aside,[c] so great as to appear at first blush to be outrageous,[d] so as to strike every one with its enormity and injustice,[e] so large that no twelve men could reasonably have given it.[f] The commonest grounds on which a verdict is set aside as excessive are that it shows passion, prejudice, partiality, or corruption.[g]

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[a] Lockwood *v.* Onion, 56 Ill. 506.

[b] Galesburg *v.* Higley, 61 Ill. 287; Chenowith *v.* Hicks, 5 Ind. 224; Wilcox *v.* Green, 23 Barb. 639; Scherpf *v.* Szadeczky, 4 E. D. Smith 110.

[c] The Commerce, 16 Wall. 33; Pleasants *v.* Heard, 15 Ark. 403; Weaver *v.* Page, 6 Cal. 681; Goins *v.* Western R.R. Co., 59 Ga. 426; Blanchard *v.* Morris, 15 Ill. 35; Butler *v.* Mehrling, 15 Ill. 488; Chicago & N. W. Ry. Co. *v.* Peacock, 48 Ill. 253; Pittsburg, C. & St. L. R.R. Co. *v.* Hennigh, 39 Ind. 509; Barth *v.* Merritt, 20 Mo. 567; Marshall *v.* Gunter, 6 Rich. L. 419; Murray *v.* Buell, 74 Wis. 14.

[d] Pittsburgh, C. & St. L. Ry. Co. *v.* Sponier, 85 Ind. 165; Ohio & M. Ry. Co. *v.* Judy, 120 Ind. 397; North *v.* Cates, 2 Bibb 591.

[e] Wunderlich *v.* Mayor of New York, 33 Fed. Rep. 854; Coleman *v.* Southwick, 9 Johns. 45.

[f] Praed *v.* Graham, 24 Q. B. Div. 53.

[g] McGowan *v.* La Plata M. & S. Co., 3 McCr. 393; Brown *v.* Evans, 8 Sawy. 488; Kelly *v.* McDonald, 39 Ark. 387; Stuart *v.* Hoffman, 68 Cal. 381; Haight *v.* Hoyt, 50 Conn. 583; McMurray *v.* Basnett, 18 Fla. 609; Spencer *v.* McMasters, 16 Ill. 405; Walker *v.* Martin, 52 Ill. 347; Decatur *v.* Fisher, 53 Ill. 407; Crose *v.* Rutledge, 81 Ill. 266; Hennies *v.* Vogel, 87 Ill. 242; Loewenthal *v.* Streng, 90 Ill. 74; Alexander *v.* Thomas, 25 Ind. 268; Pittsburgh, C. & St. L. Ry. Co. *v.* Sponier, 85 Ind. 165; Berry *v.* Central Ry. Co., 40 Ia. 564; Union P. Ry. Co. *v.* Hand, 7 Kas. 380; Missouri, K. & T. Ry. Co. *v.* Weaver, 16 Kas. 456; Atchison, T. & S. F. R.R. Co. *v.* Moore, 31 Kas. 197 (statutory); North *v.* Cates, 2 Bibb 591; Holburn *v.* Neal, 4 Dana 121; Louisville & N. R.R. Co. *v.* Mitchell, 87 Ky. 327; Field *v.* Plaisted, 75 Me. 476; Beaulieu *v.* Parsons, 2 Minn. 37; Shartle *v.* Minneapolis, 17 Minn. 308; Goetz *v.* Ambs, 27 Mo. 28; Graham *v.* Pacific R.R. Co., 66 Mo. 536; Quigley *v.* Central P. R.R. Co., 11 Nev. 350; Solen *v.* Virginia & T. R.R. Co., 13 Nev. 106 (statutory); Hovey *v.* Brown, 59 N. H. 114; Ogden *v.* Gibbons, 5 N. J. L. 518; Merritt *v.* Harper, 44 N. J. L. 73; M'Connell *v.* Hampton, 12 Johns. 236; Tinney *v.* New Jersey S. B. Co., 5 Lans. 507; Bierbauer *v.* New York C. & H. R. R.R. Co., 15 Hun 559; Oldfield *v.* New York & H.

Courts have also set aside verdicts as showing on their face undue sympathy,[a] intemperance,[b] malice,[c] caprice,[d] mistake,[e] malevolence,[f] or evident improper motive.[g] "In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the court, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case."[h] In Louisville & N. R.R. Co. *v.* Fox [k] counsel contended that a court cannot pronounce a verdict excessive, unless it be so great as to appear "at the first blush" to be outrageous. The court says: "There is a large number of cases in which the language quoted, or language similar in import, has been used by this court; but in nearly if not all of the cases in which such language has been

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R.R. Co., 3 E. D. Smith 103; Jennings *v.* Van Schaick, 13 Daly 7; Simpson *v.* Pitman, 13 Oh. 365; Wolff *v.* Cohen, 8 Rich. L. 144; Boyers *v.* Pratt, 1 Humph. 90; Moore *v.* Burchfield, 1 Heisk. 203; Nashville & C. R.R. Co. *v.* Smith, 6 Heisk. 174; Tinkle *v.* Dunivant, 16 Lea 503; Tennessee Coal & R.R. Co. *v.* Roddy, 85 Tenn. 400; Willis *v.* McNeill, 57 Tex. 465; Galveston *v.* Posnainsky, 62 Tex. 118; Farish *v.* Reigle, 11 Gratt. 697; Goodno *v.* Oshkosh, 28 Wis. 300.

[a] Waters *v.* Bristol, 26 Conn. 398.

[b] M'Connell *v.* Hampton, 12 Johns. 236; Travis *v.* Barger, 24 Barb. 614; Boyers *v.* Pratt, 1 Humph. 90; Moore *v.* Burchfield, 1 Heisk. 203.

[c] Wells *v.* Sanger, 21 Mo. 354.

[d] Jacksonville *v.* Lambert, 62 Ill. 519; Tennessee Coal & R.R. Co. *v.* Roddy, 85 Tenn. 400.

[e] Cyr *v.* Dufour, 62 Me. 20; St. Paul *v.* Kuby, 8 Minn. 154; Blum *v.* Higgins, 3 Abb. Pr. 104.

[f] Union P. R.R. Co. *v.* Hause, 1 Wyo. 27.

[g] St. Martin *v.* Desnoyer, 1 Minn. 156; Chapman *v.* Dodd, 10 Minn. 350; Shartle *v.* Minneapolis, 17 Minn. 308.

[h] Wilde, J., in Worster *v.* Canal Bridge Co., 16 Pick. 547.

[k] 11 Bush 495, 514.

used, the plaintiff was not only entitled to recover compensation, but was likewise entitled to such additional sum, by way of punishing the defendant, as the jury might deem right." In whatever form the rule is stated, it always involves a reasonable discretionary power in the court to set aside a verdict when its amount, in view of all the circumstances, is so great as to show that the jury, in arriving at it, must have been influenced by some improper motive.

§ 1322. **Practice.**—The objection to a verdict that it is excessive must be made by a motion to set it aside on that ground.(a) It cannot be considered on a simple appeal from a judgment.(b) The point must be made at the trial, for otherwise the verdict will not be disturbed, even if it is probably incorrect.(c) The usual practice upon setting a verdict aside because it is excessive is to order a new trial; but in some jurisdictions, * where the jury have given such excessive damages that the court feel bound to set aside the verdict, they will, instead of simply ordering a new trial, give the plaintiff the option of reducing the verdict to the sum which the court considers reasonable, and on his remitting the excess will deny the motion for a new trial, and this in actions of tort as well as on contracts.[1](d) Or the court may

[1] Diblin *v.* Murphy, 3 Sandf 19; Guerry *v.* Kerton, 2 Rich. L. 507; Young *v.* Englehard, 1 How. (Miss.) 19.

(a) Moody *v.* Camden, 61 Me. 264.

(b) Alfaro *v.* Davidson, 40 N. Y. Super. Ct. 87.

(c) Fletcher *v.* Tayleur, 17 C. B. 21.

(d) Davidson *v.* Molyneux, 17 L. T. R. (N. S.) 289; Blunt *v.* Little, 3 Mas. 102; The Grecian Monarch, 32 Fed. Rep. 635; Fotheringham *v.* Adams Ex. Co., 36 Fed. Rep. 252; Kinsey *v.* Wallace, 36 Cal. 462; Illinois Cent. R.R. Co. *v.* Ebert, 74 Ill. 399; Collins *v.* Council Bluffs, 35 Ia. 432; Lombard *v.* Chicago, R. I. & P. R.R. Co., 47 Ia. 494; Missouri P. Ry. Co. *v.* Dwyer, 36 Kas. 58; Doyle *v.* Dixon, 97 Mass. 208, Craig *v.* Cook, 28 Minn. 232; Kennon *v.* Gilmer, 5 Mont. 257; Belknap *v.* Boston & M. R.R. Co., 49

send the cause back to a second jury on the quantum of damages alone.[1] **

In New York the Court of Appeals may grant the privilege of reducing the verdict when the excess is due to the mistake of the court.(a) As to whether the general term can give the plaintiff the option of reducing the verdict, or of trying the case again, when the jury has erred in giving excessive damages, the decisions in that State have not been uniform. It has been held that the court in banc has no such power.(b) But the law is now settled otherwise, and in favor of this power.(c) Under the Louisiana Code the damages may be reduced by the court absolutely, without any choice on the part of the plaintiff.(d) In Georgia it is held that counsel may voluntarily remit part of a verdict, pending motion for a new trial, and if the balance is not excessive the verdict will not be set aside.(e) But in Texas this power of reducing the verdict by the action of the court has been limited to those cases where the measure of damages is matter of law, upon the ground[2] that in other cases the

[1] Boyd *v.* Brown, 17 Pick. 453. [2] Thomas *v.* Womack, 13 Tex. 580.

N. H. 358; Union *v.* Durkes, 38 N. J. L. 21; Pendleton St. R.R. Co. *v.* Rahmann, 22 Oh. St. 446; Iron R.R. Co. *v.* Mowery, 36 Oh. St. 418; Yeager *v.* Weaver, 64 Pa 425; Burdick *v.* Weeden, 9 R. I. 139; Murray *v.* Buell, 74 Wis. 14; Steadman *v.* Venning, 22 N. B. 639.

(a) Mechanics' & T. Bank *v.* Farmers' & M. Nat. Bank, 60 N. Y. 40.

(b) Moffet *v.* Sackett, 18 N. Y. 522; Cassin *v.* Delany, 38 N. Y. 178.

(c) Collins *v.* Albany & S. R.R. Co., 12 Barb. 492; Clapp *v.* Hudson River R.R. Co., 19 Barb. 461; Potter *v.* Thompson, 22 Barb. 87; Murray *v.* Hudson River R.R. Co., 47 Barb. 196; Sears *v.* Conover, 3 Keyes 113; Hayden *v.* Florence Sewing Machine Co., 54 N. Y. 221.

(d) Black *v.* Carrollton R.R. Co., 10 La. Ann. 33; Mortimer *v.* Thomas, 23 La. Ann. 165; Haselmeyer *v.* McLellan, 24 La. Ann. 629; Cointement *v.* Cropper, 41 La. Ann. 303.

(e) Central R.R. Co. *v.* Crosby, 74 Ga. 737.

court has no right to substitute its opinion for that of the jury.

In Tennessee, in the case of Vaulx *v.* Herman,[a] the trial court was dissatisfied with the verdict; but upon the plaintiff remitting part of it, refused to set the verdict aside. This was held upon appeal to have been error; for the trial court, if dissatisfied with the verdict, should set it aside. This would seem to deny the right of the court in that State to give the plaintiff an option between a *remittitur* and a new trial. In Wisconsin the Supreme Court, in case of an excessive verdict, grants a new trial, no right of *remittitur* being recognized in that court; but the court indicates what amount of damages would not be thought excessive.[b]

On principle, however, the court should in no case grant the *remittitur* as of course; for the prejudice and passion of the jury may well have entered into the finding upon other issues besides the amount of damages.[c] The court should be well satisfied with the finding of the jury upon other issues before the verdict is allowed to stand upon a *remittitur* being entered. And in Arkansas it was held that where exemplary damages are wrongly included, the court is incompetent to order a *remittitur*.[d] In West Virginia it is said that a *remittitur* will not be ordered where the court has no basis for estimating the exact amount of the damages.[e]

§ 1323. **Wrong measure of damages adopted by jury.**— Where the verdict is evidently based upon an erroneous

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[a] 8 Lea 687.

[b] Goodno *v.* Oshkosh, 28 Wis. 300; Patten *v.* Chicago & N. W. Ry. Co., 32 Wis. 524.

[c] Loewenthal *v.* Streng, 90 Ill. 74.

[d] St. Louis, I. & M. S. Ry. Co. *v.* Hall, 13 S. W. Rep. 138 (Ark.).

[e] Unfried *v.* Baltimore & O. R.R. Co., 12 S. E. Rep. 512 (W. Va.).

measure of damages, the court will not hesitate to set it aside.(a) And so where interest was not recoverable, the court directed it to be remitted.(b) And where a valid counter-claim was overlooked in estimating damages for the plaintiff, the verdict was not allowed to stand.(c) Where no damages are proved, and the case does not admit of exemplary damages, a verdict for anything more than a nominal sum will not be sustained.(d) And where exemplary damages have been improperly allowed by the jury, and the verdict exceeds the amount of actual damages, the court will interfere.(e)

Where the loss was entirely pecuniary, and the damages are much greater or less than the amount proved to be the plaintiff's loss, the verdict will be set aside.(f) Where the jury is known to have included in the verdict an improper item of damage, the verdict will not be set aside if it can be cured by the plaintiff remitting the excess.(g) But if it is impossible to determine how the

(a) Creed *v.* Fisher, 9 Ex. 472; Ray *v.* Jeffries, 86 Ky. 367; Ellsworth *v.* Central R.R. Co., 34 N. J. L. 93.

(b) Connelly *v.* McNeil, 2 Jones L. 51.

(c) Havana, R. & E. R.R. Co. *v.* Walsh, 85 Ill. 58.

(d) Smith *v.* Houston, 25 Ark. 183; De Briar *v.* Minturn, 1 Cal. 450; Oakley Mills Manf. Co. *v.* Neese, 54 Ga. 459; Cochrane *v.* Tuttle, 75 Ill. 361; Pittsburgh, C. & St. L. R. Co. *v.* Dewin, 86 Ill. 296.

(e) St. Louis, I. M. & S. Ry. Co. *v.* Hall, 13 S. W. Rep. 138 (Ark.); Toledo, P. & W. R.R. Co. *v.* Patterson, 63 Ill. 304; Farwell *v.* Warren, 70 Ill. 28; Becker *v.* Dupree, 75 Ill. 167; Hayes *v.* Parmalee, 79 Ill. 563; Kolb *v.* O'Brien, 86 Ill. 210; Cram *v.* Hadley, 48 N. H. 191.

(f) Jacksonville T. & K. W. Ry. Co. *v.* Roberts, 22 Fla. 324; Ray *v.* Jeffries, 86 Ky. 367; Cassell *v.* Hays, 51 Ill. 261; Nutter *v.* Junction R.R. Co., 13 Ind. 479.

(g) Bank of Kentucky *v.* Ashley, 2 Pet. 327; Toledo, W. & W. Ry. Co. *v.* Beals, 50 Ill. 150; Cyr *v.* Dufour, 62 Me. 20; Lambert *v.* Craig, 12 Pick. 199; Stickney *v.* Bronson, 5 Minn. 215; Sanborn *v.* Emerson, 12 N. H. 57; Pierce *v.* Wood, 23 N. H. 519; Willard *v.* Stevens, 24 N. H. 271; Odlin *v.* Gove, 41 N. H. 465; Cross *v.* Wilkins, 43 N. H. 332; Hatfield *v.* Central R.R. Co., 33 N. J. L. 251; Forbes *v.* Howard, 4 R. I. 364; Kavanaugh *v.* Janesville, 24 Wis. 618; Strong *v.* Hooe, 41 Wis. 659.

jury made up their verdict, so as to correct the error, the verdict must be set aside.[a] In Georgia the court will, it is said, set aside a verdict if, in its opinion, there is not evidence from which the jury can ascertain the amount of damage.[b]

§ 1324. **Successive verdicts.**—The reluctance which the court feels in asserting its power in doubtful cases is increased, when like results have been attained by successive verdicts.[c] Thus, where the plaintiff had been struck by a locomotive engine and badly injured, and had obtained successive verdicts for $15,000, $18,000, and $22,250, the court refused to disturb the last.[d]

§ 1325. **Cases in which the court will act.**—The court will act more readily in the matter of setting aside verdicts in actions of contract, where the pecuniary standard is usually followed.[e] But the cases fully confirm the right of the court to set aside verdicts as excessive in any kind of action.[f] In certain cases, such as actions for seduction[g] or crim. con., or for breach of promise of marriage,[h] it would require a very large verdict to authorize the court to take any action; but this is so

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[a] Smith *v.* Dukes, 5 Minn. 373.

[b] Oakley Mills Mfg. Co. *v.* Neese, 54 Ga. 459.

[c] Sexton *v.* Brock, 15 Ark. 345; Henderson *v.* Fox, 83 Ga. 233; Ross *v.* Ross, 5 B. Mon. 20.

[d] Shaw *v.* Boston & W. R.R. Co., 8 Gray 45.

[e] So in actions for services rendered, verdicts may be set aside as excessive. Lockwood *v.* Onion, 56 Ill. 506; Darling *v.* McDonald, 77 Ill. 520. And this is the practice in all actions on contract. Wallace *v.* Brown, 17 Ark. 449; Ayliff *v.* Hardy, 25 Ark. 49; Havana, R. & E. R.R. Co. *v.* Walsh, 85 Ill. 58.

[f] Boyce *v.* California Stage Co., 25 Cal. 460.

[g] Morgan *v.* Ross, 74 Mo. 318. Thus in Taylor *v.* Shelkett, 66 Ind. 297, 300, the court said, "a subject for moral and social reasoning, not of mathematical demonstration, is presented."

[h] Richmond *v.* Roberts, 98 Ill. 472, 480.

because the evidence would usually support a verdict of any magnitude. The right is often exercised in actions of tort.(a) Where, however, a statute makes the jury the sole judges of the amount of damages, the court cannot disturb their finding.(b) The court can set aside a

(a) For injuries to land: Holland *v.* Brooks, 40 Ga. 94; Oakley Mills Mfg. Co. *v.* Neese, 54 Ga. 459; City of Jacksonville *v.* Lambert, 62 Ill. 519; Cyr *v.* Dufour, 62 Me. 20. For damages to personal property: Haselmeyer *v.* McLellan, 24 La. Ann. 629; Starbird *v.* Barrows, 62 N. Y. 615. In trover: Peterson *v.* Gresham, 25 Ark. 380. For wrongful ejection from a house: Dearlove *v.* Herrington, 70 Ill. 251. For ejection from a car on a railway: Terre Haute, Alton & St. L. R.R. Co. *v.* Vanata, 21 Ill. 188; Chicago City Ry. Co. *v.* Henry, 62 Ill. 142; Ill. Cent. R.R. Co. *v.* Johnson, 67 Ill. 312; Ill. Cent. R.R. Co. *v.* Cunningham, 67 Ill. 316; Chicago, B. & Q. R.R. Co. *v.* Griffin, 68 Ill. 499; Cincinnati, H. & D. R.R. Co. *v.* Cole, 29 Ohio St. 126; Bass *v.* Chicago & N. W. R.R. Co., 39 Wis. 636. For personal injuries: Chicago & R. I. R.R. Co. *v.* McKean, 40 Ill. 218; City of Decatur *v.* Fisher, 53 Ill. 407; City of Chicago *v.* Fowler, 60 Ill. 322; City of Chicago *v.* Kelly, 69 Ill. 475; Northern Line Packet Co. *v.* Binninger, 70 Ill. 571; City of Chicago *v.* Elzeman, 71 Ill. 131; Chicago & Alton R.R. Co. *v.* Murray, 71 Ill. 601; City of Chicago *v.* Hoy, 75 Ill. 530; Chicago, R. I. & P. R.R. Co. *v.* McKittrick, 78 Ill. 619; City of Chicago *v.* Brophy, 79 Ill. 277; Deppe *v.* Chicago, R. I. & P. R.R. Co., 38 Iowa 592; Belair *v.* Chicago & N. W. R.R. Co., 43 Iowa 662; Hanson *v.* European & N. A. R. Co., 62 Me. 84; Clapp *v.* Hudson River R.R. Co., 19 Barb. 461; McMahon *v.* Walsh, 43 N. Y. Super. Ct. 36. For causing death: Potter *v.* Chicago & N. W. R.R. Co., 22 Wis. 615. For malicious prosecution: Potter *v.* Seale, 5 Cal. 410; Russell *v.* Dennison, 45 Cal. 337; Nelson *v.* Danielson, 82 Ill. 545. For false imprisonment: Green *v.* Southern Express Co., 41 Ga. 515; Newton *v.* Locklin, 77 Ill. 103. For assault and battery: Alcorn *v.* Mitchell, 63 Ill. 553 (an action brought against defendant for spitting in plaintiff's face, in which $1,000 was held not excessive); Mitchell *v.* Robinson, 72 Ill. 382; Bell *v.* Morrison, 27 Miss. 68. For slander: Flagg *v.* Roberts, 67 Ill. 485; Miller *v.* Johnson, 79 Ill. 58; Woodson *v.* Scott, 20 Mo. 272; Potter *v.* Thompson, 22 Barb. 87. For libel: McDaniel *v.* Baca, 2 Cal. 326; Storey *v.* Wallace, 60 Ill. 51; Daly *v.* Byrne, 43 N. Y. Super. Ct. 261. For breach of promise of marriage: Douglas *v.* Gausman, 68 Ill. 170. For enticing plaintiff's wife away: Scherpf *v.* Szadeczky, 1 Abb. Pr. (N. Y.) 366. For seduction: Patterson *v.* Thompson, 24 Ark. 55; Sargent *v.* ———, 5 Cow. 106; Travis *v.* Barger, 24 Barb. 614, and cases there cited. And for crim. con.: Crose *v.* Rutledge, 81 Ill. 266. Though in such an action a verdict is seldon disturbed: Harris *v.* Rupel, 14 Ind. 209.

(b) Lewis *v.* Black, 27 Miss. 425.

referee's report on account of excessive damages, as well as a verdict.(a) And it seems that, in a proper case, the assessment of a judge may be reversed for the same reason.(b)

§ 1326. **Inadequate damages.**—* The forbearance of the court to interfere with the jury is so great that, in actions of tort, the general rule has been held to be, that a new trial will not be granted for smallness of damages.[1](c) But if the jury so far disregard the justice of the case as to give no damages at all where some redress is clearly due, the court will interpose.(d) So where, in case for negligence, for defendant's servant driving against the plaintiff, it appeared that the plaintiff's thigh was broken, and considerable expense incurred for surgical treatment; the plaintiff obtained a verdict, damages *one farthing;* a new trial was granted on payment of costs; and Lord Denman said: "A new trial on a mere difference of opinion as to amount, may not be grantable; but *here* are no damages at all."[2]** And it is now settled that a

[1] Lord Townsend *v.* Hughes, 2 Mod. 150; Mauricet *v.* Brecknock, 2 Doug. 509; Hayward *v.* Newton, 2 Strange 940; Barker *v.* Dixie, 2 Strange 1051; 21 Vin. Abr. 486, Trial Y, g.; Lord Gower *v.* Heath, Barnes' Notes, 445; Regina *v.* Justices of West Riding, 1 Q. B. 624, 631.

[2] Armytage *v.* Haley, 4 Q. B. 917. See, also, Cook *v.* Beal, 1 Ld. Raym. 176; s. c. 3 Salk. 115; Brown *v.* Seymour, 1 Wils. 5; Austin *v.* Hilliers, Hard 408.

(a) Eastman *v.* Mayor of New York, 5 Robt. 389.

(b) Miles *v.* Barrows, 122 Mass. 579.

(c) Hayward *v.* Newton, 2 Str. 940; Kelly *v.* Sherlock, L. R. 1 Q. B. 686; Howard *v.* Barnard, 11 C. B. 653 (in which case the point was considered that the jury had not been influenced by improper motives); Apps *v.* Day, 14 C. B. 112; Bradlaugh *v.* Edwards, 11 C. B. (N. S.) 377; Kennedy *v.* Way, 7 West. L. J. 414. And this was held especially true when the judge at Nisi Prius was satisfied with the verdict. Gibbs *v.* Tunaley, 1 C. B. 640.

(d) Rendall *v.* Hayward, 5 Bing. N. C. 424; Nicholson *v.* N. Y. & N. H. R. Co., 22 Conn. 74; Clapp *v.* Hudson River R R. Co., 19 Barb. 461 (*semble*).

verdict will be set aside as inadequate for the same reasons that justify setting a verdict aside if excessive.[a]

So, in trespass, where the jury had not given the entire value of the property taken, the verdict was not allowed to stand.[b] And in an action brought by a seller against a purchaser, to recover damages for not accepting and paying for the goods sold, the judge set aside the verdict for the plaintiff, because, although a verdict for the defendants would not have been disturbed, the damages found by the jury were less than any of the evidence in the case justified, if there were any recovery whatever.[c] In Wilson *v.* Hicks,[d] an action on contract, this power was exercised conditionally upon the plaintiff's relinquishing the costs of the first trial. Where an action is brought for serious personal injuries, a verdict for nominal damages will be set aside.[e] And a verdict which does not even cover the necessary surgical expenses, will receive the same treatment.[f]

This right will be enforced, particularly in those cases in which the smallness of the verdict shows that the jury have made a compromise.[g] In cases of insufficient damages, the verdict should not be annulled if the defendant will consent to an increase of the amount of

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[a] Beattie *v.* Moore, L. R. 2 Ire. 28, 31; Duncan *v.* Jackson, 16 Fla. 338; Sullivan *v.* Vicksburg, S. & P. R.R. Co., 39 La. Ann. 800; Caldwell *v.* Vicksburg, S. & P. R.R. Co., 41 La. Ann. 624; Watson *v.* Harmon, 85 Mo. 443; Pritchard *v.* Hewitt, 91 Mo. 547; Robinson *v.* Waupaca, 77 Wis. 544.

[b] Porteous *v.* Hazel, Harp. L. (S. C.) 332.

[c] McDonald *v.* Walter, 40 N. Y. 551.

[d] 26 L. J. Ex. 242.

[e] Beattie *v.* Moore, L. R. 2 Ire. 28; Robbins *v.* Hudson River R.R. Co., 7 Bosw. 1.

[f] Tedd *v.* Douglas, 5 Jur. (N. S.) 1029.

[g] Falvey *v.* Stanford, L. R. 10 Q. B. 54; although, in Richards *v.* Rose, 9 Ex. 218, this rule was doubted.

damages,(a) and the court can sometimes indicate the sum by which the verdict should be increased. Thus in Alloway *v.* Nashville,(b) where the jury erred in omitting interest, the interest was added by the court without ordering a new trial. In Howard *v.* Barnard (c) the court said, that if there is no reason to suppose that the jury was actuated by improper motives, or if another verdict would probably be so small that a new trial would not be worth while in view of the additional costs, the verdict will be upheld. The most important case upon this subject is Phillips *v.* London & S. W. Railway Co.(d) The action was brought to recover damages for personal injuries sustained on the defendant's railway. The plaintiff was a physician, receiving an income of £5,000 a year from his practice. He was permanently disabled, mentally and physically, and had already been unable to exercise his profession for sixteen months. It was also shown that his life had undoubtedly been shortened. A verdict for £7,000 was set aside, and a new trial awarded, upon the ground that the damages were inadequate. On a second trial the plaintiff recovered £16,000, and this was held not to be excessive.(e)

§ 1327. **Modes of computing damages allowed the jury.**— A question has presented itself as to the mode in which the jury may arrive at the quantum of damages in cases where they are greatly divided on the question of amount. The jury cannot abdicate its functions and decide the amount by chance. So, in the old case of Mellish *v.*

(a) Richards *v.* Sandford, 2 E. D. Smith 349.

(b) 88 Tenn. 510.

(c) 11 C. B. 653.

(d) 5 Q. B. D. 78.

(e) Phillips *v.* London & S. W. Ry. Co., 5 C. P. D. 280.

Arnold ([a]) a new trial was granted, "because the jury threw up cross or pile, whether they should give the plaintiff three hundred pounds or five hundred pounds damages, and the chance of five hundred pounds came up." * It has been decided that if they *agree beforehand*, that each juror shall mark the sum to which he conceives the plaintiff entitled, and that the total of these amounts divided in twelve (the number of jurors) shall be the verdict, the whole proceedings will be void, and a new trial will be ordered, for the reason that the whole thing is a mere matter of chance.([b]) So, in New York, it has been decided that the jury will not be allowed to arrive at a verdict by each of the jurors marking down a particular sum, and then dividing the whole amount by the number of jurors; and on assignment of error in fact, the judgment for this cause will be reversed.[1] So, in England, the court will not permit the jury to arrive at a verdict by splitting a difference.[2] But if the same course be taken in order to ascertain with more accuracy how the jury stands, the rule is different; and it has been held not improper for them to arrive at their verdict by each marking a sum and dividing it by twelve, provided they do not previously bind themselves to adhere to the result of the arithmetical computation.([c]) ** It is, of course, error to charge

[1] Harvey *v.* Rickett, 15 Johns. 87; [2] Hall *v.* Poyser, 13 M. & W. 600. Roberts *v.* Failis, 1 Cowen 238.

([a]) Bunb. 51.

([b]) Illinois Cent. R.R. Co. *v.* Able, 59 Ill. 131; Manix *v.* Malony, 7 Ia. 81; Parham *v.* Harney, 6 Sm. & M. 55; Elledge *v.* Todd, 1 Humph. 43.

([c]) Wilson *v.* Berryman, 5 Cal. 44; Turner *v.* Tuolumne Co. Water Co., 25 Cal. 397; Boyce *v.* California Stage Co., 25 Cal. 460; Pekin *v.* Winkel, 77 Ill. 56; Guard *v.* Risk, 11 Ind. 156; Barton *v.* Holmes, 16 Ia. 252; Dorr *v.* Fenno, 12 Pick. 521; St. Martin *v.* Desnoyer, 1 Minn. 156; Dana *v.* Tucker, 4 Johns. 487; Kreider's Estate, 18 Pa. 374; Forbes *v.* Howard, 4 R. I. 364; Tinkle *v.* Dunivant, 16 Lea 503; Fowler *v.* Colton, Burn. (Wis.) 175.

the jury that this course may be pursued.[a] In Boynton *v.* Trumbull[b] the jury agreed among themselves to give a verdict for half the aggregate of the lowest and highest sums allowed by them individually, and the verdict was consequently set aside. It seems to be improper, if witnesses differ as to value, to charge the jury that an average of the estimates may be taken.[c]

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[a] Allard *v.* Smith, 2 Met. (Ky.) 297.
[b] 45 N. H. 408.
[c] Thomas *v.* Dickinson, 12 N. Y. 364, *per* Johnson, J.

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